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AMERICAN GOVERNMENT

**HEATH POLITICAL SCIENCE SERIES**

C. PERRY PATTERSON, UNIVERSITY OF TEXAS

*General Editor*

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# AMERICAN GOVERNMENT

BY

CALEB PERRY PATTERSON, PH.D., LL.B.

PROFESSOR OF GOVERNMENT  
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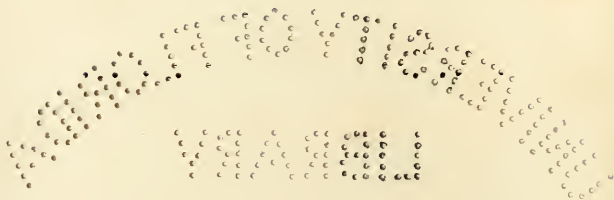
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# Part I

## Theory



## CHAPTER I

### THEORIES OF THE STATE

The state is one of the oldest institutions of civilization and is undoubtedly its chief bulwark. It may now be regarded a universal phenomenon. Without it man would be helpless and society chaotic. For more than two thousand years the realization of his hopes and ambitions has been the object of its solicitude and the preservation of his life and property its major purpose. During this period it has so effectively served his interests that the convulsions of society have never seriously threatened its permanence. In his interest, it has constantly changed the form of its organization and the scope of its activities. Its origin, nature, and functions, however, are still matters of debate.<sup>1</sup>

#### I. ORIGIN OF THE STATE

1. *The Social Contract Theory.* According to this theory man originally lived in a state of nature. He was a law unto himself. There was no organized society. He protected himself by his cunning and physical powers. This was a pre-civil condition of man.<sup>2</sup> When this mode of living became intolerable, he decided to join with his fellow men in establishing a political organization, each agreeing to surrender certain of his rights to the body politic for the welfare of all, but retaining those inalienable rights with which nature's God endowed him. At this stage of the game, the law of the body politic superseded the law of nature. By his consent, man had become subject to the rules of a society which he had helped to establish and of which he was a member with certain privileges, immunities, and duties.<sup>3</sup>

While this theory is very flattering to man in that it credits him

<sup>1</sup> Charles Grove Haines and Bertha Moser Haines, *Principles and Problems of Government* (Rev. Ed., 1926), 1-22.

<sup>2</sup> W. W. Willoughby, *The Nature of the State* (1896), 62.

<sup>3</sup> This theory of the origin of political society is developed in Hooker's *Ecclesiastical Polity* (1594), Hobbes' *Leviathan* (1651), Locke's *Civil Government* (1690), and Rousseau's *The Social Contract* (1762).

with deliberately establishing political institutions by agreement, historians have failed to find a single example of a state established by this method.<sup>4</sup> Moreover, it is inconceivable that savages from the forest would come together and practice such methods without any knowledge of political institutions. Furthermore, the relation of the individual to the state is not voluntary but compulsory. We are born members of the state. This theory, therefore, does not adequately account for the origin of the state.<sup>5</sup>

2. *The Divine Right Theory.* This theory held that Kings ruled by divine right and were, therefore, vicegerents of God upon earth. It held wide sway in the sixteenth and seventeenth centuries and served to keep a King's subjects loyal to him since to disobey him was to incur the displeasure of God. The King's regulations were sacred; therefore, all Christians would obey. This doctrine was a great support to the monarch in keeping the peace. This theory had for its main purpose, however, to place the kings of Europe on a parity with the Pope—they supreme in temporal matters and he in spiritual—both equally divine.

With the development of democratic principles and the consequent downfall of monarchy, this theory lost its basis. The community or people began to exercise authority. The principle of non-resistance was no longer followed. National unity in the nineteenth century superseded the symbol of political unity which the King had heretofore represented. Political authority was now in the possession of the people and, hence, the facts of political organization did not square with the theory. In such instances, it is the theory that changes and not the facts. In this instance, the theory had served its purpose and was ready for the historical archives.<sup>6</sup>

3. *The Force Theory.* The advocates of this theory claim that the state is the product of force. Gradually through a period of conquest man came to have dominion over man and tribe over tribe. The physically strong came to control the weak. The contest ended in the triumph of might. "The origin of the state or political society", says an eminent authority, "is to be found in the development of the art of warfare."<sup>7</sup> While there is an element of historical truth in this theory, it does not place the state on a very stable basis. If the state is the result of force, then its overthrow

<sup>4</sup>For a careful presentation of the defects of this theory, see Willoughby, *op. cit.*, 89-118.

<sup>5</sup>Raymond Garfield Gettell, *Introduction to Political Science* (Rev. Ed., 1922), 81-87.

<sup>6</sup>For a criticism of this theory, see Willoughby, *op. cit.*, 50-53.

<sup>7</sup>Edward Jenks, *A History of Politics* (1900), 73.



may be expected and justified on a basis of force. While it must be admitted that force has played a part in the establishment of the state and that its permanency ultimately rests upon force, the fallacy of this theory is its contention that force is solely responsible for this phenomenon. To support the force theory of the origin of the state one would be compelled to maintain that might makes right. A right established by this method admits of overthrow by the same process which might end in the opposite being established as a right. It thus becomes contradictory in results. An institution that deserves support only so long as its overthrow is impossible is on a rather precarious basis. It by no mean follows that because the authority of the state rests upon force the state itself had its origin in force. Nor is it logical to contend that the state as an institution is the product of force just because history furnishes examples of particular states created by "blood and iron" and others destroyed by the same means.<sup>8</sup>

4. *The Evolutionary Theory.*<sup>9</sup> The state is the consummation of a continuous development produced by the interplay of the forces of society, beginning in a very primitive and unconscious way, but gradually and constantly assuming a more definite process, and finally producing the universal organization of mankind. It has thus become a fundamental expression of human nature, and, therefore, is not the result of force, the contrivance of man, or the handiwork of God. It must first have appeared as an idea in a purely subjective form and then gradually by a long and painful process have manifested itself in objective institutions and laws. "A state," says a recognized authority, "owes its existence to the fact that, in the individuals over whom its authority extends, there is a sentiment of unity sufficiently strong to lead them to surrender themselves to the control of a single political power for the sake of realizing the desires to which such a sentiment gives rise. In other words, this subjective condition first comes into being, and when sufficiently powerful, finds objective manifestation in the creation of a political organization."<sup>10</sup>

The evolutionary theory does not dogmatically base the origin

<sup>8</sup> See James W. Garner, *Introduction to Political Science* (1910), 119-120; Stephen Leacock, *Elements of Political Science* (Rev. Ed., 1913), 33-39; and Gettell, *op. cit.*, 79.

<sup>9</sup> Another classification of the theories of the origin of the state is: (1) the instinctive theory, (2) the force and necessity theory, (3) the divine right theory, (4) social contract theory, (5) the common-consent theory, (6) the evolutionary theory, and (7) the economic theory. See Haines and Haines, *op. cit.*, 32-44.

<sup>10</sup> Willoughby, *The American Constitutional System* (1904), 6.

and development of the state upon a single force or factor, but accepts the contribution of all the forces of history and the tendencies of mankind that have aided in the process. "Man's capacity for associated action and social relationships of all kinds has proceeded by a gradual development parallel with that of his physical and intellectual aptitudes."<sup>11</sup> "The state, then, is older than philosophy, older than art, older than a generally exercised reflective consciousness. Men did not consciously create it, they were born into it. It developed as they matured. The state is a primal reality, practically coeval with man as a social being."<sup>12</sup> The state in final analysis becomes "a unity created out of a mere sum of individuals by means of a sentiment of community of feeling and mutuality of interest, and this sentiment finds expression in the creation of a political power, and the subjection of the community to its authority."<sup>13</sup> "It is," according to a well-known authority, "the gradual realization, in legal institutions, of the universal principles of human nature, and the gradual subordination of the individual side of that nature to the universal side."<sup>14</sup>

## II. THE ESSENTIALS OF A STATE

1. *Territory.* Territory is one of the physical elements of the state without which the state is inconceivable.<sup>15</sup> No definite amount of territory either as a minimum or a maximum can be specified as the requisite basis of a state. The tendency in state development has been toward larger states.<sup>16</sup> In the days of Grotius (1583-1645), the father of international law, there were more than two thousand states in Europe. There are now only about seventy states, including some twenty-two or three in the New World which have been added since the seventeenth century. One of the most significant movements of modern times is the process of state federation, examples of which are Italy, Germany, and the United States. A little state is in a very uncomfortable position in the modern world because it is at a distinct disadvantage in dealing with larger and more powerful states.

The boundaries of a state whether large or small must be fixed

<sup>11</sup> Leacock, *op. cit.*, 42.

<sup>12</sup> David Jayne Hill, *The People's Government* (1915), 8.

<sup>13</sup> Willoughby, *The Nature of the State*, 119.

<sup>14</sup> John W. Burgess, *Political Science and Comparative Constitutional Law* (1890), I, 59.

<sup>15</sup> Gettell, *op. cit.*, ii.

<sup>16</sup> Leacock, *op. cit.*, 49.

in order to mark the limits of its authority and make it a separate political entity. This is necessary to prevent conflicts between states, which, as indicated above, are always anxious to expand their territorial limits. Hence, a state to be at peace with its neighbors must have its territorial limits definitely fixed. States, however, have been created and recognized as members of the family of nations before their boundaries were fixed.<sup>17</sup>

2. *People*. A mere expanse of territory does not constitute a state. It must contain a population capable of maintaining itself physically and politically. Originally such a people was united by blood ties, real or assumed, and lived together because of this relation, but expansion of population has substituted for the band of kinship those of contiguity, geography, and interdependence of relations.<sup>18</sup>

3. *Government*. An organized government is generally considered one of the constituent elements of the state because it is by means of a government that the will of the state is ascertained and executed.<sup>19</sup> A state without a political organization could not defend itself nor have relations with its inhabitants and other states. The inhabitants of a state by the establishment of a civil government give a juristic personality to the state and thus enable it to have a common will, which is called law. A government, therefore, is the outward manifestation of the state. The state contemplates an exercise of authority—a condition prevalent only when there are governors and the governed.

No particular form of government is necessary to meet the requirement of statehood. It may be autocratic or democratic in spirit; unitary or federal in structure; limited or absolute in its authority. The government of an Indian prince that can command and enforce its will meets the demands of political science.

4. *Sovereignty*. "In popular usage," says Garner, "sovereignty means the original, supreme, and unlimited power of the state to impose its will upon all persons, associations, and things within its jurisdiction: in short, it is that quality of the state by virtue of which it may command and enforce obedience to the exclusion of all other wills. In popular usage the term also has reference to the independence of the state from foreign control, that is, its right to live its life and pursue its ends independently of the will

<sup>17</sup> Poland and Czecho-Slovakia were recognized by the "Allies" before their territorial limits were determined.

<sup>18</sup> Woodrow Wilson, *The State* (Rev. Ed., 1918), 8.

<sup>19</sup> Garner, *op. cit.*, 79.

of other states.”<sup>20</sup> A state without sovereignty becomes a dependency or a protectorate of another state.

The idea of sovereignty was developed during the latter Middle Ages to justify the absolute monarchy and it was first formally stated by Jean Bodin, a French political philosopher of the sixteenth century.<sup>21</sup> France was the first nation to develop the absolute monarchy. It was natural that a French writer would be the first to justify the existence of this new political order. When government came to be regarded as the agent of the state, sovereignty was transferred from the monarch to the state and was defined as the supreme, perpetual, and indivisible power of the state. This is known as the monistic theory of sovereignty. Under this theory law, which was once the will of the monarch, is now the command of the sovereign state expressed by its legislature or courts. While sovereignty may acknowledge certain moral limitations, and always proceeds at the risk of revolution, it acknowledges no legal limitations.

While this theory of sovereignty was devised to fit a specific situation and may be regarded as a sort of legal fiction, it has come to be regarded as an intensely practical convenience as it is the basis of operation for the modern states of the world. In every such state there is somewhere an authority, which, in the last resort, controls absolutely and beyond appeal every individual and organization within its territorial limits.<sup>22</sup>

In recent years the monistic theory of sovereignty has been severely criticized on the grounds that it never had any factual basis, that it is a purely metaphysical conception to conjure with, and that it is no longer necessary to wave a magic wand of this kind to govern mankind. Its critics redefine the state in terms of reality and propose to see states as they are and not as idealistic conceptions. Leon Duguit, a French political philosopher and possibly the most able exponent of this new school of thought, regards the state as “a body of men living in a definite territory, in which the stronger impose their will upon the weak.”<sup>23</sup> Law, according to this school, is not the product of the state, but is superior to the state.<sup>24</sup> The state is a mere society of persons for

<sup>20</sup> *Ibid.*, 80.

<sup>21</sup> William A. Dunning, *Political Theories From Luther to Montesquieu* (1913), 96-103.

<sup>22</sup> Jenks, *op. cit.*, 151-152.

<sup>23</sup> Charles Edward Merriam and H. E. Barnes, *Political Theories, Recent Times* (1924), 101.

<sup>24</sup> Leon Duguit, *Law in the Modern State* (tr. F. and H. Laski, 1919), 243.



certain purposes and is subject to law in the same way as other social groups are. Law is not made by the state, but results from social solidarity and expresses a social purpose. It is only organized and promulgated by the state.<sup>25</sup>

It is the purpose of this school to restate political theory in accordance with the facts of modern life as it sees them. It regards the sovereign state as a great barrier to social progress and international order. It is an attempt to get away from fiction and metaphysics. The state is only one of many institutions that are the objects of mankind's solicitude and it has no right to dominate over all others. The state, according to Harold J. Laski, an eminent English publicist and exponent of this school, must humble itself and seek a place in the modern pantheon on terms of democratic equality with the other institutions of society. He denies "the claim of the state to represent in any dominant and exclusive fashion the will of society as a whole."<sup>26</sup>

The monistic theory says law is the command of the state; the pluralists, as this new school is called, say it is a social custom expressive of a social purpose. The monists make sovereignty an abstract quality of the state; the pluralists make it a matter of public opinion.<sup>27</sup>

It is not necessary to say that the one is false and the other true. There is some truth in each. It is undoubtedly true that a theory of the state based upon the facts of a dead society needs readjustment in order to square with the facts of modern organization and procedure. While there are features of the internal organization and administration of the state as well as its relations in international affairs that support the pluralistic contention and clearly indicate that the erstwhile sovereign state will have an increasingly difficult task to remain sovereign in the future, it is also submitted that the pluralists have not completely worked out their theory nor has it been generally accepted.<sup>28</sup> "The pluralists have, however," says Professor Coker, "made clearer than has been made before the superiority of society to law,"<sup>29</sup> but on the whole he thinks their contribution to the theory of the functions of the state is supplementary to that of the monists and does not supplant the doctrine of state sovereignty.

<sup>25</sup> H. Krabbe, *The Modern Idea of the State* (tr. by Sabine and Shepard, 1922), 47.

<sup>26</sup> Harold J. Laski, *Authority in the Modern State* (1919), 81.

<sup>27</sup> See Merriam and Barnes, *op. cit.*, 80-111.

<sup>28</sup> *Ibid.*, 89-119.

<sup>29</sup> *Ibid.*, 116.

The location of sovereignty, granting that there is such a thing, is susceptible of three solutions: <sup>30</sup> (1) in the people or the enfranchised part of them—the voters; (2) in the body that exercises constituent powers, and (3) in the law-making agencies of the state.

In the first instance, sovereignty would be popular or political. This location of sovereignty marks a long and painful transition from the days when sovereignty was exercised by the monarch, later by an aristocratic minority, and lastly by the voters of a modern democracy. The development of the doctrine of equality among men, general intelligence, education, and political consciousness has made it possible to develop self-government, by means of which the voters at the ballot box can express themselves on public questions. The will of the majority controls, and, hence, is sovereign. Political sovereignty may be defined as the will of the majority expressed by the exercise of the suffrage. In Great Britain, the electorate controls Parliament.<sup>31</sup>

In the second instance, sovereignty would be legal in character since the body that can make or change the constitution of a state, which creates its government, determines its form, fixes its powers and its relations to its citizens, exercises the highest legal powers, and is, therefore, legally sovereign. In Great Britain, Parliament is legally sovereign; <sup>32</sup> in France it is the National Assembly, which is composed of the Senate and the Chamber of Deputies.

In the third instance, sovereignty is exercised by all the law-making agencies of the state, including legislatures, national and local, courts, executives, conventions, and the electorate. In the exercise of their powers, these agencies operate under a fundamental law or constitution. In reality they exercise only sovereign powers; sovereignty itself being deposited in the nation or the state as a whole. In the United States, governmental agents are not regarded as possessing sovereignty; they never cease to be the servants of the people, exercising only such powers as are granted them. This may be regarded as a more satisfactory solution of this difficult problem.

The chief difference between political and legal sovereignty is that the political sovereign can dictate to the legal sovereign, which in turn expresses the former's wishes in the form of law. The one is the voter's sovereign and the other is the lawyer's sovereign.

<sup>30</sup> Gettell, *op. cit.*, 98-114.

<sup>31</sup> Garner, *op. cit.*, 244.

<sup>32</sup> *Ibid.*, 243.

The lawyer and the courts recognize only the legal sovereign, who alone can express in legal form the commands of the state.<sup>33</sup>

### III. TYPES OF STATES

1. *The City State* was the prevailing form of state organization of the ancient world; Athens, Thebes, Sparta, and even the Roman Empire were of this type, though the latter approached what might be called the world state. The term city did not embrace only the city proper but all of the territory that the city governed. Representative government had not been devised as a means for controlling large areas. It was necessary, therefore, for the city as the seat of authority to control the outlying territory by subordinate agents. All political activities took place within the city proper. All persons who had the right to vote were forced to go to the city to exercise it. This type of state has practically disappeared, though there are still city states as parts of the German Republic.

2. *The Feudal State* succeeded in the order of time the city state, being the prevailing form of the state during the Middle Ages, during which period England, France, Germany, and Italy were feudal states. The feudal state was *individual*, not *communal*. Every individual was attached to a superior to whom he paid tribute or service for protection. The higher ranks rendered military service to their superiors; the peasants paid rent or rendered labor for their land; the craftsmen of the town paid for their charter of privileges; and the priests said prayers for the good of the soul of their patrons. The whole of society assumed a feudal aspect.<sup>34</sup>

Authority in the feudal state was decentralized. It was primarily exercised by the great landlords who recognized the king as a suzerain but not as a sovereign. From the point of view of authority the state was completely disintegrated. In fact, the organization of the state was personal and not political.

The feudal state was essentially territorial in character. Whoever lived or happened to be within its limits was its subject and bound to obey the call to arms. Military allegiance was the basis of community life because it had largely been by means of arms that its territory was acquired.

3. *The National State*. The feudal states of Great Britain, France, Italy, and Spain have become national states. While the

<sup>33</sup> *Ibid.*, 240.

<sup>34</sup> Jenks, *op. cit.*, 73-83.



feudal state possessed people, sovereignty, territory, and an organized government—the essentials of a state—it did not possess *racial* or *cultivated* unity; it was generally a racial polyglot. It was a hodgepodge of peoples, languages, customs, legal systems, and traditions. The fusion of all these elements into a *cultural* unity plus the essentials of a state constitute a national state.<sup>35</sup> The nation and the state are coextant in the national state—possibly the highest form the body politic can assume. The state may exist without the nation and the nation without the state. A nation is simply a cultural unity, which may or may not be organized into statehood. The Jews are a nation—although scattered throughout the world; the Poles were a nation before the state of Poland was established; they are now a national state. There may, therefore, be several nations in the same state, or, a nation may be divided into several states. A state composed of several nations constantly faces the danger of political dissolution; for example, Imperial Russia or Austria-Hungary. A nation composed of several states is likely to solve its problem of unity by centralization; for example, Germany and the United States. It is well, therefore, to keep in mind that the term nation has an ethnic significance while the state is a concept of law and politics.<sup>36</sup>

In the United States, we began our national existence divided into several states and lived through what is known as the critical period of American politics under this form of political organization, but in 1787 when our present Constitution was established, it is generally held that we became one state—the United States; certainly this was true so far as national and international affairs are concerned. The individual states were reduced to areas of local government, losing all participation in national and foreign affairs. While we still speak of these individual units as states, it is largely because of historical reasons and legal purposes. Since the acts of the state governments are law if they conform to the national Constitution and their respective state constitutions and since law is supposed to be the command of the state, it is technically necessary to regard these units as states to satisfy the requirements of lawyers and judges. They might, however, for the practical purposes of government, just as well be called provinces as in Canada, or cantons as in Switzerland, because they do not meet the requirements of states for either domestic or international purposes. Practically, they are largely autonomous units of local government.

<sup>35</sup> Garner, *op. cit.*, 45-46.

<sup>36</sup> See Burgess, *op. cit.*, I, 24.

## IV. THE FUNCTIONS OF THE STATE

The functions of the state are its services. They may be many or few, depending not upon its nature in general but upon its organization in a particular instance. Shall the state merely keep order, preserve, and protect the lives, liberty, and property of its citizens, or shall it also regulate banking, railroading, manufacturing, merchandising, mining, and practically every activity of the individual, even to his personal habits, or shall it actually own and operate all the agencies of production and distribution such as land, mines, forests, railroads, banks, and manufactures, and thus completely eliminate private enterprise? These are questions that involve the relation of the state to society, to groups, and to the individual. Where shall the line be drawn between the public and private initiative best to conserve the highest interests of both society and the individual? These are questions on which there is considerable diversity of opinion which may be divided into about four schools of thought:<sup>37</sup> (1) the anarchistic,<sup>38</sup> (2) the individualistic, (3) the paternalistic, (4) the socialistic or communistic.

1. *The anarchistic theory* says that government is an unnecessary evil. It is the logical completion of individualism. It would abolish the state and allow the individual to wear sovereignty under his own cap. It places no limitations upon freedom except such as the struggle for existence, modified by the considerations that individuals would voluntarily recognize, would impose. The anarchists believe that the orderly and ethically minded majority would control the violent elements of society in the interest of order and justice.<sup>39</sup> Voluntary associations of various kinds would be formed to accomplish public improvements, to protect life and property, and to conduct such activities in business and education as individuals might desire. In this way, according to this theory, mutual action of a purely voluntary nature is substituted for the coercion of the state.<sup>40</sup>

There are several fallacies in this theory. In the first place, the state is not an evil. Practically all progress has been made under state organization. Of course, the state has been used at times by individuals and groups against the best interests of the public,

<sup>37</sup> Willoughby, *The Nature of the State*, 319.

<sup>38</sup> Anarchism, which abolishes the state, really cannot logically be considered as a theory of the functions of the state, but it is generally grouped by publicists along with the others.

<sup>39</sup> Willoughby, *The Nature of the State*, 319.

<sup>40</sup> Gettell, *op. cit.*, 380.

but what institution has civilization produced that has not been misdirected occasionally? Could voluntary organizations escape this experience? Would they not be controlled by the majority? Would they operate to the music of the spheres? Again when a voluntary group would undertake to control an outside element, would not coercion be used? Who would prefer the coercion of an absolute group to that of the state under law? Also, the exponents of this school fail to see that government and liberty are not contradictory ideas.<sup>41</sup> They say the more government the less liberty. Experience shows that liberty can be maintained only by means of government. The individual has a right to demand that the state protect him in his liberty of speech, contract, assembly, and all legitimate action. It does not require much of an imagination to conceive a society cut into so many organizations to which the individual would be subjected, whether a member or an outsider, as to reduce his freedom of action to a minimum. What authority would limit either the number of organizations or their activities? What would result in case of stubborn opposition? Internecine war would apparently become the process of adjudicating differences. "As a system of rational politics, then," says Willoughby, "anarchism is without a logical basis. While it denies the right or utility of political action in general, it opens the way to the introduction of a compulsion that is not to be distinguished from it in essence, and which is, in addition, arbitrary and incapable of limitation or regulation according to precise principles."<sup>42</sup>

2. *The individualistic school* stresses the importance of the private rights of property, life, and liberty, and contends that the functions of the state should be restricted to the protection of these rights, by the maintenance of law and order and the enforcement of contractual relations. Its exponents, while they admit the necessity of the state, regard government as a necessary evil, and hence, maintain that the government is best which governs least. They regard an extension of the functions of the state as necessarily a restriction upon the natural rights of the individual. Society exists for the benefit of the individual and not the individual for the interests of society. Man should be left free to achieve his highest self unhampered by the intervention of the state. In this way a race of supermen would be produced—the survival of the fittest. In fact, they argue that the state exists to control the criminal element, and, therefore, its functions should be "to restrain, not to direct

<sup>41</sup> Garner, *op. cit.*, 291.

<sup>42</sup> *The Nature of the State*, 320.

and promote.”<sup>43</sup> The holdings of the individualists may be epitomized by saying that they regard the sole duty of the state to be the protection of the individual from violence and fraud.<sup>44</sup> Hence, as man acquires a higher sense of order and morality, the state becomes increasingly unnecessary, and, in the course of time, its demise may be confidently expected. “At this point,” says Willoughby, “individualism merges into anarchism pure and simple, and the two views are thus distinguished only by the fact that, while the anarchist would depend upon such occasional coercion as voluntary association would provide, until this moral perfection of man is attained, the individualist advocates the exercise, until then, of police powers by a regularly constituted State.”<sup>45</sup>

This theory of the functions of the state has since the eighteenth century been the basis of actual operation of the governments of modern times, and, until recently, was generally defended by both the economic and the political theorists. While it is not in as good repute as it was fifty years ago, it is not in a state of innocuous desuetude at the present time. In fact, in a modified form it is the basis of operation of both the American and British governments.

The old individualism was not far from anarchy; modern individualism is only modified anarchy. It would be more logical to eliminate individualism as a theory of the functions of the state and regard its exponents as a more conservative school of anarchists, because they expect to transform society into the anarchistic type as soon as man's evolution will permit. In spirit, they are anarchists, but are willing to suffer temporarily while the rest of mankind assumes their own high level.

The individualists are, therefore, subject to practically all the criticisms that may be directed against the anarchists. They are really not advocates of a permanent order of restricted individualism. The fallacies of their philosophy may be best shown by first summarizing its main points:

First, self-interest is a universal principle.

Second, the individual, in the absence of restrictions, will follow his own best interests.

Third, free competition, in the absence of restraint, may be depended upon to eliminate the unfit and develop a society of the best.

<sup>43</sup> Garner, *op. cit.*, 274.

<sup>44</sup> Leacock, *op. cit.*, 359.

<sup>45</sup> *The Nature of the State*, 321.



Does self-interest always control the action of the individual or the group? Can the individual always be expected to follow his own best interests? What changes in society have been made without resistance on the part of individuals? How about sanitation, good roads, compulsory education, pure food and drugs, child labor, regulation of banks, scientific farming, and improvement of live stock? Again, does free competition always exist and does it necessarily end in the survival of the fittest? It cannot be successfully maintained that competition always exists. In fact, if the contestants are not of equal struggle, the weaker will be eliminated. There really is no true competition except on a basis of equality. Almost from the beginning it has been the mission of the mind of man to eliminate the waste of competition.<sup>46</sup>

3. *The paternalistic theory* advocates a still larger province of state activities than that temporarily conceded by the individualists. Its exponents believe that the state should be used whenever its intervention will increase the happiness and prosperity of all the people. The amount of such intervention would vary with the capacity of the people and its stage of development. Some people are more capable of initiative than others, and, hence, would require less assistance and direction from the state. A people in a low state of civilization, possessing only a simple society, would not have the social problems that a people highly developed industrially would have and hence government might in such an instance restrict its functions to those of a protective character. According to this theory, the activities of the state would constantly vary with the developments of any one people, and would not necessarily be the same for any two peoples unless they were of equal resourcefulness and development.<sup>47</sup>

There can be, therefore, no hard and fixed formula for the basis of the functions of the state that would satisfy the proponents of this theory. They must remain a subject for constant debate and readjustment in order that the needs of society may be met. The functions of the state may be divided into two classes: *essential* and *optional*. There is practically no debate about the first class of functions. It is generally agreed that they include the maintenance of the existence of the state against external force and the preservation of life, liberty, and property of its citizens. These functions embrace the relations of the state with other states, with

<sup>46</sup> For the most convincing arguments against the law of competition, see Lester Ward, *The Psychic Factors of Civilization* (1897), 251.

<sup>47</sup> Willoughby, *The Nature of the State*, 311.

its citizens, and of the citizens with one another. The state merely directs the activities involved in these relations and adjusts such difficulties as require coercion for their settlement.

The second class of functions may be made as extensive as any society desires. They are not essential to the existence of the state, and are, therefore, purely optional. Many of these, however, such as caring for unfortunates, maintenance of streets, roads, libraries, schools, post office, public health service, and postal savings banks are regarded as legitimate functions of the state. This list may be extended to include a set of functions which are sometimes regarded as socialistic. Among these may be enumerated such activities as the ownership and operation of railroads,<sup>48</sup> street car systems, telegraph lines, water works, gas and electric light plants, and the regulation of capital and labor. Those who oppose the performance of these functions by the state contend that they lie primarily in the field of individual initiative and that they can be performed more effectively and economically by individuals than by the state.

The tendency is for the state to invade more and more the field of what has heretofore been regarded as the province of private enterprise.<sup>49</sup> This has been done on the claim that the general welfare demanded it. Private enterprise has largely been responsible for this development by not conducting its business in a manner satisfactory to society. Many businesses such as those listed above are of a semi-public nature and must be managed with the interest of the public constantly in mind. The problem is one of properly balancing the welfare of society against the interest of the individual. The line of separation is difficult to draw with much assurance because so much depends upon the proper exercise of the particular function in question whether by the state or the individual. The American system of government was founded upon individualism which has constantly been modified in the direction of the paternalistic theory, assuming what might be regarded as a compromise program.

4. *The socialistic and communistic conception* of the functions of the state is directly opposed to the individualistic. The latter believes that the state should prepare for its demise; the former advocates the conversion of the state into a coöperative commonwealth which would control all the instrumentalities of production and distribution, such as land, capital, mines, forests, factories,

<sup>48</sup> Frank Sargent Hoffman, *The Sphere of the State* (1894), 89-111.

<sup>49</sup> *Ibid.*, 68-87.

banks, wholesale houses, retail stores, and transportation systems. The socialists claim that these things are too vital to the public welfare to be managed in the interest of individuals. Moreover, they contend that in the competition and favoritism of individualism great wastefulness and injustice result. Individualism favors the rich, argue the exponents of this theory, because the capitalist can monopolize the opportunities of society. The rich become richer and the poor grow poorer, resulting in the extremes of wealth and poverty.<sup>50</sup>

Socialism maintains that the laborer does not fairly share in the earnings of business. Too much goes to capital, to directors, and supervisors, or to speculators and middlemen, and too little to the actual producers of wealth. By eliminating private capital, private initiative, and all middlemen, the state would be free to manage all individual enterprises as governmental activities by means of departments and bureaus. The state under socialism becomes everything.

The opponents of this theory doubt that the state can do all that the socialists say it can. Can the state by mere decree produce equality of economic status and banish misery and poverty from the land? Is not this ideal, they inquire, too fantastic and utopian for realization? Is it not an over-estimation of the power of the state? Could the state properly organize the machinery of government necessary to perform all these activities and efficiently manage it? Would not such a machine break down by virtue of its own unwieldiness? The functions of the state would under socialism be too numerous and diverse for comprehension, organization, and administration.

The critics of this doctrine claim that the destruction of the right of private property would be fatal to society because it would kill the incentive to effort and industry and society would soon become parasitic. "Socialism," says Professor Garner, "will never be practicable until there is a fundamental change in human nature, to some of whose deepest principles it runs counter."<sup>51</sup>

As a theory of the functions of the state, socialism advocates too much; in practice it has accomplished a great deal. Government control of banking, ownership and operation of transportation systems, telegraphs, and mines, operation of postal system, management of public education, coinage, building and maintaining roads, hospitals, theatres, and museums, and the ownership and operation

<sup>50</sup> Gettell, *op. cit.*, 386.

<sup>51</sup> *Op. cit.*, 305.



of light, water, and gas plants certainly indicate that socialism has made considerable inroads upon individualism.

It should be pointed out by way of summary that all theories of the province of the state are shades of individualism or socialism. There is not a state in existence that does not function along both lines. The functions of one state may be largely individualistic, another socialistic, and a third an extreme of either individualism or socialism, or a combination of the two with almost any number of variations. The capacity of the people, the stage of industrialization of society, and the degree of its homogeneity are factors in the solution of this problem.

The reasons for the growth of socialism or increased state activity in almost all phases of modern life as advanced by its adherents may be briefly stated:<sup>52</sup> (1) The inherent monopolistic element in modern industry as illustrated by municipal public utilities. They assert that this factor exists in manufacturing and mining as well as water and light plants and street railways. (2) In other instances the establishment of a state monopoly would eliminate great waste, and in this connection they compare the delivery of mail by the state with that of milk by private enterprise in which enormous duplication of effort and investment are found. (3) State ownership and operation would conserve both human and natural resources, and thus eliminate the prodigality from modern industry. They call attention to the exploitation of the forests, coal, iron, and oil by private initiative without thought for the future. The state being a permanent institution while man is only of today would be interested in conservation. (4) Again, the socialists say under private enterprise only profit producing industry survives. The state would produce whatever was needed. If education, they say, were made a private matter and placed on a profitable basis, the poor would not be educated. (5) Men would quit seeking to defeat one another's projects and forgetting the interests of the public, and as a result would gain great spiritual and moral improvement from being coworkers in a common society.<sup>53</sup>

<sup>52</sup> James W. Garner, *Political Science and Government* (1928), 476-489.

<sup>53</sup> Merriam and Barnes, *op. cit.*, 185-187.

## CHAPTER II

### THEORIES OF GOVERNMENT

#### I. THE ORIGIN OF GOVERNMENT

Government in its widest sense is the ruling power in a political society. In every human society there is a determinate body, consisting of one individual, or a few or many individuals, whose commands the rest of the society obeys. This body is the government of the society or community.

There are, broadly speaking, three theories of the origin of government:<sup>1</sup> (1) the legendary, (2) the metaphysical, and (3) the historical.

The legendary account which is based on the primitive stories told by the nations themselves usually gives the credit to a single lawgiver. Lycurgus founded Sparta, Solon Athens, Numa Rome, and Alfred England. There seems to have been no curiosity about comparative government in those days; each nation was delighted to have such an illustrious founder whose characteristics were much more important than those of the government itself.

The metaphysical theory is a mere contrivance of rather poor logic. Its originators analyzed government, then speculated on how men would behave without government, and concluded that they must have conducted themselves this way before government came into existence. A society without a government resolves itself into a set of individuals, who follow their own wills; hence, by this process of reasoning, men in primitive society followed their own purposes. This primitive state was called by these metaphysicists a state of nature. Hobbes,<sup>2</sup> an English philosopher, said that this state was a state of war, and as a result men came together and established a government by agreement to keep the peace. Locke,<sup>3</sup> another English philosopher, said that the state of nature was a state of liberty and equality and that it was governed by natural law. This state of nature, according to Locke, continued

<sup>1</sup> Chester C. Maxey, *The Problem of Government* (1925), 20-29.

<sup>2</sup> William A. Dunning, *Political Theories From Luther to Montesquieu*, 268 *et seq.*

<sup>3</sup> *Ibid.*, 349 *et seq.*

until men voluntarily came together and agreed to establish a supreme government to which they surrendered their natural liberty. Rousseau,<sup>4</sup> a French philosopher, claimed that the civil state originated in a social compact on a basis of unanimity. Then a government was established by legislative act by the majority expressing the general will.<sup>5</sup> He maintained that the state of nature was a condition of ideal happiness and that it was abandoned by men only when the growth of population and the evils of an advancing civilization forced them to do so. At this time they formed a social contract by means of which each merged his natural rights into a common authority or general will. To administer this general will a government was established as the agent of the people in whom final authority remained.<sup>6</sup>

The historian of society rejects both the legendary and metaphysical theories of the origin of government and declares that no law or formula can be announced to explain this phenomenon. He professes to be able only to trace governmental forms through various phases of social evolution. He finds that all societies of men contained elements of government, and that government is almost as old as man, being almost inseparable from human affairs.

Government is, therefore, older than the state, and may be said to have originated in family discipline, especially in that of the patriarchal family in which the father was recognized as the ruler. "The family", said Woodrow Wilson, "was the primal unit of political society, and seed-bed of all larger growths of government."<sup>7</sup> Kinship was the bond of unity of this group. As the family grew and multiplied into the tribe, this same tie remained as the unifying force. Religion bore a close relation to kinship in that it took the form of ancestor worship, a profound deference to parental authority rendered during life to the head of the patriarchal household, which, after his death takes the form of ceremonial worship.<sup>8</sup> By accepting the family religion, outsiders or aliens were adopted into the family and thus acquired all the benefits derived from their new relations. This practice applied to groups, families or tribes, as well as to individuals. By these means, the family developed into tribes and these into commonwealths.

<sup>4</sup> William A. Dunning, *Political Theories From Rousseau to Spencer* (1920), 8 et seq.

<sup>5</sup> James W. Garner, *Introduction to Political Science*, 105.

<sup>6</sup> Géza Englemann, *Political Philosophy* (tr. by K. F. Geiser, 1927), 264-287.

<sup>7</sup> *The State*, 13.

<sup>8</sup> Edward Jenks, *A History of Politics*, 38.

Obedience to a common authority, protection of tribal law, and the existence of the governmental organization of the tribe are features of these early experiments in social control that closely resemble the first governments of Europe. The tribal chief with his council was not unlike Charlemagne and Alfred the Great with theirs. The tribal chief was the prototype of the medieval king and his council the precursor of the medieval parliament. The worship of the ancestor led to a reverence for his practices which became the customs or laws of the tribe. Law was not a thing to be made but to be discovered—the same idea that is basic in the development of the English common law.

In this evolution, it is noticed that civil society is derived from social institutions or rather it is coeval in the primitive way with them. This is a natural and logical outgrowth of man's efforts to find a convenient and satisfactory method of living with his fellows and is evidence of the soundness of Aristotle's observation that man is by nature a political animal.<sup>9</sup>

## II. THE DEVELOPMENT OF DIFFERENT FORMS OF GOVERNMENT

It is evident from the above discussion that governments came into existence as a result of natural conditions as well as deliberate choice. As man developed in the scale of intelligence and education, he began to give more attention to government and to devise governmental machinery to suit his purpose. The government came to be more and more an expression of the character of the people who were living under it. Any government in both its structure and method of operation reflects the method of thought and action of its people. The English government does not have a written constitution outlining its powers and principles because the Englishman does not mark matters out in this way. He does not attempt to sketch the future and provide a method for solving problems that have not arisen. He never pledges himself to the future, but pursues the policy of attacking problems when they present themselves, usually waiting until they have reached an aggravated form, and of making such solutions of them as the facts seem to him to warrant. He makes no pretensions to system; he hates it. His government reflects his character.

The American is just the opposite. He is a great lover of system whether or not he follows it. He wants a written fixed constitution in which he can see his rights and relations to government in print.

<sup>9</sup> Aristotle's *Politics* (tr. by William Ellis), 4.



Whatever he does, he attempts to use method in its accomplishment. He wants to know now what he can do ten years hence and how he can do it. He must have a chart of the future for himself and his descendants. His government bears his image. The same is true of the political institutions of any people. The human element in the evolution of political institutions was a strong factor in producing variation in both structure and operation. Peoples differ in their national habits, temperament, psychology, ideals, political aptitude or training, and methods of doing things. Political institutions are modified by these factors.

Geographical influences also materially affect the development of political institutions. Rivers, mountains, climate, and soil may dictate the size of political units, the compactness of settlement, representative or direct democracy, or a unitary or federal form of government. Why the New England township and representative government in Virginia? Climate and soil is the answer. Why did the East become industrial and nationalistic and the South agricultural and individualistic? It was the human response to physiographical influences. Finally these sections went to war with each other over the character of our federalism, largely as the result of the unconscious influences of these silent but powerful forces.

The insular position of Great Britain has had a profound influence on her political institutions. It is generally regarded as being responsible for the development of the limited monarchy for the reason that it made it unnecessary for the people of Great Britain to maintain a standing army for national defense. When the English King wanted to engage in a foreign war, he had to concede the demands of parliament to secure an army. This process continued for a few hundred years and ended in the limitation of the king's prerogatives and the establishment of parliamentary government. A different geographical situation on the continent of Europe produced the opposite result. The juxtaposition of the territories of the French and German kings caused them to be in almost constant war with each other and hence to require standing armies for this purpose. An absolute monarchy was the result in both countries. The government of Switzerland and Canada are additional examples of political institutions that were greatly affected by physical forces.<sup>10</sup>

<sup>10</sup> See, Robert C. Brooks, *Government and Politics of Switzerland* (1921), 1-15, and Edward Porritt, *Evolution of the Dominion of Canada* (1920), 13-58.

Political institutions everywhere are the result of the action and interaction of almost innumerable forces. They slowly evolve and as they become older they become necessarily the expression of the nation in its entirety under whose influences they have developed. They are not hot-house plants. They are not made by constitutional conventions, constituent assemblies, legislative bodies, or hurled into a full-grown existence by lawgivers. Such agencies have played a part in this evolution, but generally their function has been to express formally a development that was already demanding recognition.

### III. THE CLASSIFICATION OF GOVERNMENTS

1. *As to the exercise of power*, governments may be divided into *autocracies*, *aristocracies*, and *democracies*,<sup>11</sup> yet it must be understood that such a classification is based on the formal organization of governments and not on their actual working basis. It is legal and not political. It is relatively unimportant and is likely to be misleading unless it is recognized that legal forms frequently fade into meaningless symbols in the game of practical politics. Since many publicists speak of the forms of the state, it should be pointed out that all states are absolute, and therefore, cannot be classified.<sup>12</sup> It is the governments of the states that vary in their forms and hence are capable of classification.

The autocracy is that form of government in which the supreme power of the state is not only vested in a single person but is also exercised by him. The sovereign of the state is also the head of the government. He must be legally and politically absolute. He is really his own chief minister and rules without restraint. An autocracy is an absolute monarchy, such as Russia and Germany were before the revolutions of 1917 and 1918. The limited monarchy may in fact be a liberal democracy as in Great Britain. A monarchy might be an autocracy, an aristocracy, or a democracy, depending on whether one, few, or many actually exercise the governing power. Monarchy, therefore, really has no significance as a term of government. It refers to the legal head of the state, the govern-

<sup>11</sup> Aristotle considered monarchy, aristocracy, and democracy the prevailing forms of governments, but he said that monarchy tended to degenerate into tyranny, aristocracy into oligarchy, and democracy into anarchy. *Politics*, Ch. VII; see also Garner, *op. cit.*, 169-178; Raymond Garfield Gettell, *Introduction to Political Science*, 351-379; Wilson, *op. cit.*, 26-42; John W. Burgess, *Political Science and Comparative Constitutional Law*, I, 68-82.

<sup>12</sup> W. W. Willoughby, *The Nature of the State*, 353.

ment being political in character and taking its form from the number actually exercising the political authority of the state.<sup>13</sup>

An aristocracy is a government in which a few persons really exercise the governing power. This form of government ceased to exist with the ancient world. There remain aristocratic elements in several governments, such as the House of Lords in Great Britain, the Italian Senate, and the Canadian Senate, but there is not a single aristocracy or autocracy in existence in a first class nation.

A democracy is an inverted autocracy. "If the great mass of the adult male citizens share in the government, either through the choice of its agents, through participation in the enactment of law by means of the so-called initiative or referendum, or through a popular assembly of all the citizens, we have," says Professor Garner, "a democratic form of government or a democracy."<sup>14</sup> All these definitions are subject to many limitations. The autocrat is limited by the customs, traditions, habits, and the character of his people. These things cannot be changed by word of mouth. Modern governments are a mixture of autocratic, aristocratic, and democratic elements. The American President has been called a 'disguised monarch'; France a 'monarchical republic'; monarchical England a 'representative democracy'; Germany an 'imperial republic'; and monarchical Italy a 'socialist state.' After all, it must not be forgotten that government is not as much a matter of form as it is a matter of fact. It is not easy to discover who actually governs any nation. Government is not a mere matter of suffrage, elections, representatives, executives, and courts. To be sure it is all these, but much more. What are the forces and influences that actually frame, enact, or enforce the legislation of the nation? The form of government is not a thing to become excited about, but the actual process of government is worthy of the closest study.

2. *As to distribution of powers*, governments are either unitary, confederate, or federal.<sup>15</sup> In the unitary, the powers of government are in the possession of the central agent which for purposes of local government may divide the state into administrative areas and establishes in these by legislative acts such local governments as it thinks necessary. Local government in such a system rests upon

<sup>13</sup> See Wilson, *op. cit.*, 31-36.

<sup>14</sup> *Op. cit.*, 170. Professor Garner would undoubtedly eliminate the word 'male' from this definition since women are now a part of the electorate of most democracies.

<sup>15</sup> See Garner, *op. cit.*, 191; Gettell, *op. cit.*, 172, 230; Stephen Leacock, *Elements of Political Science*, 118.



the basis of statutory law and is almost exclusively the administrative agent of the central government. "In this form there is no constitutional autonomy in the localities; no independent local government."<sup>16</sup> The central government legislates for the entire nation and uses local government to help it administer its will. The central government grants to local government such powers as it thinks proper and supervises their exercise. It usually controls the budgets, appoints, and removes the chief officers of the local government. The unitary government is the descendant of the absolute monarchy,<sup>17</sup> and, therefore, is popularly regarded as undemocratic. This does not necessarily follow. If the central government is under popular control, there is no reason why the powers of local government may not be made as extensive as the people desire, and subject to as much or as little control as harmony with the central government and efficiency require. The fact that local government in the unitary system is always the creature of the central agent and is, therefore, subject to constant change by mere legislative act is no valid reason why it cannot be stable and largely free in the exercise of its power. This will depend upon the wishes of the people and their control over the central government. County and municipal governments are under legislative control in the United States and have been relatively free from legislative intervention or administrative supervision.

The unitary system has the great advantage of *flexibility*. It is comparatively easy to change the division of powers between local and central government in the unitary government because it can be done by a mere legislative act. Society changes its economic and social structure so rapidly that it is always a difficult matter to keep the political order in harmony with it. These social changes frequently require a redivision of the powers between local and central governments. If this readjustment can readily be made, friction is eliminated and society is efficiently served. The unitary system is easily modified to fit a rapidly changing social order.

The unitary government is especially adapted to a highly and uniformly developed society. "This form," says Burgess, "is best suited for states of small or moderate territorial extent and having a perfectly homogeneous population; i.e., completely national states."<sup>18</sup> It is practically impossible to separate a unified society

<sup>16</sup> Burgess, *op. cit.*, II, 4.

<sup>17</sup> The Netherlands is an example of unitary government that has resulted from the centralization of a federal system.

<sup>18</sup> *Op. cit.*, II, 4.

into distinct parts or areas and establish within these areas local governments responsible only to the people of these units. Society molds the type of government; not government the type of society. This is why the more loosely organized types of governments approach the unitary form as the societies on which they are based become more homogeneous, more uniform industrially, and more interdependent or more densely populated.

The unitary government calls for a high degree of efficiency on the part of its officers, or its people if it is a democratic system, for the reason that it has assumed the task of both central and local governments. It does not rid itself of the responsibility for local government by establishing subordinate agents for this purpose because it must legislate for and supervise the administration of these agents. The multiplicity of its functions and the consequent host of officials make it into a complex and unwieldy machine. This situation, further aggravated by the technical character of modern government, practically calls for a bureaucracy which neither the people nor their representatives can efficiently supervise. It becomes in final analysis a government very largely by the civil service.<sup>19</sup>

The unitary government is a strong government because the central agent can always force the local agents to support its policy. If the local officers become disloyal to the policy of the central government, they can be removed. If a people are difficult to control and are surrounded by hostile neighbors, then a government that can exert the full force of the nation is needed. The unitary form meets this requirement.

The unitary type is most suitable for the units of a federal system or small national states, i.e., the individual American states or such nations as Great Britain, France, Italy, Belgium, and the Netherlands. The government of a small state has relatively few functions and a small number of officials; is comparatively simple in mechanism and close to the people; and is, therefore, susceptible of being easily administered and controlled.

There is, however, considerable agitation in Great Britain, France, and Spain for a modification of the unitary system in the direction of a larger and more independent autonomy for local government. This movement is called Regionalism in France, Devolution in Great Britain, and Separatism in Spain. It demands a withdrawal of powers of a local nature from the central govern-

<sup>19</sup> Civil service means the large body of permanent officials who constitute the administrative force of the nation.

ment and the vesting of these in newly established local governments for larger and more independent areas with a view of giving more local self government to the people. "There comes a point," says Laski, "in the business of government when the further burdening of the central authority does not produce an adequate return for the outlay it involves. Decentralization becomes at that point essential. It is the only way in which the congestion by which all unitary governments are oppressed can be relieved. It provides the only method by which the necessary attention can be given to special and local needs."<sup>20</sup>

The confederate type of government is based on sovereign local units usually called states. The central government is the agent of these units and operates with their approval. It is more of a diplomatic body than it is a government. It is generally a preliminary form of organization in the process of union and is subject to dissolution by its members. The United States under the Articles of Confederation (1781-1789) is an excellent example of this scheme of organization. No confederacy has ever remained a permanent form of government.

A federal government is a dual government "in which the state distributes the powers of government between two classes of organizations, which are so far independent of each other that the one cannot destroy the other or limit the power of the other or encroach upon the sphere of the other as determined by the state in the constitution."<sup>21</sup> The problem of government is divided between a central government for the nation as a whole and a series of local governments for provincial or state purposes. Both central and local governments have their powers fixed in the constitution and each is sovereign in the exercise of its own powers. Each part of the duality exercises its powers independently of the other directly upon the individual and "neither is in essence an agency of the other, although it is conceivable, and often true, that the one may and does employ the other as agent."<sup>22</sup>

The federal type of government is particularly suited to large states with diversity of interests, differences in language and re-

<sup>20</sup> *Authority in the Modern State*, 383-384. See Raymond Leslie Buell, *Contemporary French Politics* (1920), 391-399; Joseph Barthelemy, "Le Mouvement de décentralisation," *Revue du Droit Public*, XVI, 114 ff.; Harold J. Laski, *The Foundations of Sovereignty* (1921), 37; James W. Garner, "Administrative Reform in France," *Am. Pol. Sci. Rev.*, XIII, 30 ff.

<sup>21</sup> Burgess, *op. cit.*, II, 5.

<sup>22</sup> *Ibid.*, II, 6.

ligion, and variation and contrariety in social and industrial development, because the local units of the system can be given an autonomy compatible with their particularisms. Federalism is an expression of both union and division. Both of these elements must find adequate expression in the structure of the government, but the distinguishing feature of federalism is its provision for and protection of the right of local-self government. The larger the state the more necessary it is to have local units of government established on such a basis as to enable them to assume on their own account responsibility for the local phases of the problem of government and thus free the central government for the consideration of only those matters which concern the entire state.

Federal government, historically speaking, has generally been the result of a process of unification over a period of years or centuries, confederacy being a step in this process. The United States, Switzerland, Germany, Canada, and Australia are examples of federalism that eventuated from confederation. Federalism, however, may result from decentralization; *i.e.*, Mexico, Brazil, and Argentina. It is generally regarded as the product of centralizing factors and by some as only a preliminary step to the unitary type. "The federal system," said Burgess, "is not so clearly transient, although it can hardly be regarded as the ultimate form. Its natural place is in states having great territorial extent, inhabited by a population in a stage of reasonably high political development, either in class or in mass, but not of entirely homogeneous nationality in different sections. When these ethnical differences shall have been entirely overcome, something like the federal system may, indeed, conceivably remain, but the local governments will become more and more administrative bodies, and less and less law-making bodies. In fact, it looks now as if the whole political world, that part of it in which the centralized form of government obtains as well as that part still subject to the federal form, were tending towards this system of centralized government in legislation and federal government in administration."<sup>23</sup> Republican Germany well illustrates this tendency. Federal government is a means of accomplishing a degree of union without unity by accommodating the many differences in the body politic. When these localisms disappear, the foundations of federalism no longer exist and it becomes increasingly difficult to prevent centralization.

There are various degrees and forms of federalism. The distribution of powers between central and local government may take

<sup>23</sup> Burgess, *op. cit.*, II, 6.



the direction of a large grant of powers to the central government and a small reservation to local government, or the distribution may be rather evenly balanced between the two, or it may be made primarily in the interest of local government. In other words there is opportunity to vary the distribution of powers in either direction and to any extent, making either central or local government as strong or as weak as seems desirable.<sup>24</sup> There is also the principle of reserved powers that is regarded as fundamental in the organization of federal government. The reserved powers are those that are not enumerated in the constitution in which the distribution of powers is made. These may be left in the possession of local government as in Switzerland, Australia, and the United States or in the hands of the central government as in Germany and Canada. Whether the one or the other method is followed is not entirely a matter of indifference. The tendency in any federal system is for the central government to invade the field of local government. The struggle in all such systems has been to preserve local self government. The chief glory of federalism is its provision for an autonomous local government. When it ceases to provide this, it is abolished in fact regardless of what legal relics may still persist. This being true, it would seem wiser for the reserved powers to be deposited with local government, because it is the method most calculated to preserve a proper balance between collectivism and localism.<sup>25</sup> Administration in federal systems is also subject to various solutions. The central government may have its own administrative system separate and distinct from those of local government, as in the United States. This makes each division of the government independent of the other in the enforcement and administration of its laws and, is, therefore, in the interest of the preservation of each wing of federalism in its full vigor. It is, however, the most complex solution of this problem and presents opportunity for confusion and conflict for the reason that the administrative agents of both central and local government will operate in the same territory and on the same individuals. Furthermore, various means and subterfuges will be used by the one to embarrass the agents and instrumentalities of the other and *vice versa*. This has been our experience in the United States.<sup>26</sup> The other solution is to leave the administration of national law to the

<sup>24</sup> In the distribution of powers, the federal systems of Germany, Switzerland, Canada, Australia, Brazil, Argentina, Mexico, and the United States differ from one another in many respects.

<sup>25</sup> See James Quayle Dealey, *The State and Government* (1921), 153-158.

<sup>26</sup> Burgess, *op. cit.*, II, 7-8.

agents of local government. Again, each division of the system may have its own courts as in the United States, or judicial administration may be entrusted to the courts of local government save a national supreme court to unify the law and to decide conflicts between the units of local government, and between them and the central authority.

There can be no dogmatic conclusions reached on the relative merits of the unitary and federal types of government. Neither can be prescribed for all peoples under any and all circumstances. The unitary is more feasible for small states with a thoroughly homogeneous people, having relatively little initiative and an inclination to follow leadership. The federal is more suited to large states with a heterogeneous population and variations in culture and social order that make for a separatism which is, nevertheless, willing to operate under a certain degree of union for general purposes. Federalism is not always a matter of choice at the time of its establishment, but is accepted as the highest degree of unity obtainable at the time. It is also true that most unitary governments are monarchies or resulted from historical antecedents of this type in the establishment of which deliberation and choice played a very small part. Both types may be organized so as to express the national hopes of almost any people, and if properly administered, should achieve satisfactory results.<sup>27</sup> Both tend to approach each other in the course of time; for in the unitary there is generally a movement for greater local autonomy and in the federal there is a constant shift toward centralization.<sup>28</sup>

3. *As to type of constitution*, governments are said to be either a matter of men or a matter of law. It has been generally contended that whether a government is one of men or of law depends on whether its constitution is unwritten or written. If the constitution is unwritten, the government is one of men; if written, it is one of law. For example, the government of Great Britain, it has been said, usually by American writers, is a government of men because its constitution is unwritten, while that of the United States is a government of law because its constitution is written.

Whether a government is one of law or of men does not depend upon the written or unwritten character of its constitution but upon

<sup>27</sup> The British Empire is an example of unitary governments containing practically every conceivable political status. It is so anomalous as to consist of a confederacy called the British Commonwealth of Nations, the parts of which vary all the way from federal to unitary in character.

<sup>28</sup> See Frank J. Goodnow, *Principles of Constitutional Government* (1916), 75-81.

whether or not its constitution is regarded as a fundamental law. The written constitutions of Europe, those of Germany, France, and Switzerland, are not regarded as fundamental and supreme laws and enforceable in the courts against either governments or individuals as is the case with the Canadian, Australian, and American constitutions. The former are merely political restraints upon their parliaments, and if they are violated by these bodies, only political action can furnish the remedy, while the latter are legal restraints upon legislative authority, and if they are violated by the legislative bodies, their acts may be set aside by the courts of law.<sup>29</sup> In the former the will of the government prevails, though to be sure it may be expressed in statute law, while in the latter the will of the government, which may also be expressed in statute law, will prevail only if it is in harmony with the constitution or the fundamental law. "No man in this country," said Justice Miller, "is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it. It is the only supreme power in our system of government, and every man who, by accepting office, participates in its functions is only the more strongly bound to submit to that supremacy and to observe the limitations which it imposes upon the exercise of the authority which it gives."<sup>30</sup>

It is true, however, that too much can be made over this difference which legalists are inclined to exaggerate. Actual government cannot be made exclusively a matter of paper. No constitution or law can be so meticulous, unequivocal, and prolix as to provide a definite mode of action in every situation that may rise in practical politics. A constitution should not attempt to provide much more than a general framework of government with possibly a grant and limitation of powers stated in rather general terms; it should never be a code of specifics. To the extent that a constitution has limitations in this respect, government must be a matter of men.<sup>31</sup>

Again, all students of practical politics recognize that there is always a set of extra-legal agencies of government or legal agencies exercising extra-legal powers which play a large part in actual government. Political parties, the press, civic organizations by the hundreds, and numerous lobbying agencies are examples of these unconstitutionalized agents that constitute the invisible government.

<sup>29</sup> Burgess, *op. cit.*, I, 174-183.

<sup>30</sup> *United States v. Lee* (1882), 106 U. S. 196.

<sup>31</sup> Goodnow, *op. cit.*, II.



Furthermore, the science of administration is taking government out of the hands of the legislators and judicial officials and placing it under the direction of the practical-minded expert who deals with the problems of government on the basis of scientifically gathered facts.<sup>32</sup> The civil service corps, boards and commissions, special investigating agencies, committee systems of legislative bodies, arbitrating agencies, and bureaus of research are illustrations of this newer tendency in government. Constitutions and blue prints cannot be made the basis of the operation of these agencies. The complexity of modern life and the demand for efficiency and economy have forced such agencies into existence. This tendency means a breaking away from rigid constitutions and governments of law. The law of government in the future will be a set of scientific facts which will dictate what must be done and how it shall be done. This is the field of administration which must enjoy a wide discretion unhampered by legal technicalities in order to perform its functions satisfactorily.

The logic of facts seems to say that the rigid constitution in the American sense must become less and less an instrument of government for the future. Bills of rights must count for less, trial by jury for less, property rights must harmonize with the interest of society; theory must give way to facts, or new theories must be constructed to fit the facts involved in the problem of government, or probably still better, government must face the facts largely unhampered by academic or legalistic prescriptions.

4. *As to type of executive*, governments are either parliamentary or presidential.<sup>33</sup> Parliamentary government is sometimes called cabinet or responsible government.<sup>34</sup> In this system, a body of chief ministers constitute the cabinet or the government. They are usually members of the legislative body and the leaders of the majority party in the legislature. The cabinet or the government is responsible to the legislature for the manner in which it conducts the affairs of the nations. At the head of the cabinet is a prime minister who is their leader and spokesman before the nation. He is the political head of the government, while the legal head may

<sup>32</sup> John A. Fairlie, "Administrative Legislation", 18 *Michigan Law Review*, 181.

<sup>33</sup> There is a mixture of these two, sometimes called the executive council type, which is illustrated in the Swiss system. See James Bryce, *Modern Democracies* (1921), II, 463.

A third type formerly found frequently was based on rule by one man and was called autocratic. For a brief discussion of the autocracy, see *ante*, 24.

<sup>34</sup> James Wilford Garner, *Political Science and Government* (1928), 323.

be a king, as in Great Britain, or a President, as in France and Germany. He may be hereditary, as in Great Britain, or elective, as in France and Germany.

The political head of the government is nominally selected by the legal head from the political leaders of the party that controls the legislature. In fact, he makes himself prime minister by becoming the head of his party. He assumes the leadership of his party by the same means which any man uses to achieve political preferment. After the political head of the government is selected, he as the prime minister or first minister selects the other ministers from the leaders of his party. In the cabinet, therefore, are found the most able leaders of the party in power and through them as the heads of the great executive departments the administration of the government is conducted. They also propose most of the legislation that is enacted into law. Hence, the party in power through these leaders really governs with the advice and consent of the legislative body.<sup>35</sup>

In the parliamentary system, legislative and executive authority is vested in the same body—the legislature or the parliament. There is, therefore, unity of purpose in the making and administration of law. Those who enforce the law, having also enacted it, know what their object was and can straightway accomplish it. Legislative and administrative unity gives an element of strength and certainty to this type of government and it fixes responsibility in the same hands for the complete process of government.

Parliament or cabinet government is responsible government.<sup>36</sup> The cabinet proposes its program of legislation to the parliament which either passes or rejects it. If it is rejected, the cabinet is defeated and must either resign or appeal over the heads of the parliament to the voters. If it chooses to place its program before the voters for their approval and then is defeated, it must resign; if, however, its policy in such instances is approved, it remains in power. It must always proceed in either legislative or administrative matters on the supposition that these eventualities may follow. It must always face the possibility and frequently the probability of defeat. The legislative body may vote a lack of confidence in its leadership or pass a vote of censure upon its policy. Either of such actions has the same effect as a defeat and may be followed

<sup>35</sup> See W. W. Willoughby and Lindsay Rogers, *An Introduction to the Problem of Government* (1921), 299-321.

<sup>36</sup> Charles Grove Haines, "Ministerial Responsibility Versus the Separation of Powers," 16 *Am. Pol. Sci. Rev.*, 194-210.

by the same procedure. Another form of control is the daily quizzing of the cabinet by the members of the legislative body on almost any matter connected with the conduct of the affairs of the government. The direct contact between the executive and the legislature in this system makes not only for control of the one by the other but also for an intelligently directed government. Whatever information is in possession of any member of the executive or legislature is at the disposal of all.

The effectiveness of these elements of control of the cabinet depends primarily on a strong "opposition," by which is meant that the minority party or party groups should be well organized and strong enough to be able to defeat occasionally the majority party or the party of the government in both parliament and at the ballot box and to threaten its ascendancy at all times.<sup>37</sup> In other words, parliamentary government becomes rather absolute and irresponsible when the party of the government is in power with such a majority as to enable it practically to ignore the "opposition" and to a large degree be ignored itself by its own cabinet by virtue of the votes it has to spare beyond the necessary majority.<sup>38</sup>

Parliamentary government is essentially representative government if the representatives really control the cabinet. In Great Britain this is not strictly true; in France it is possibly too true. There is such a thing as proper control by the representatives without destroying the leadership of the cabinet. In France, where the cabinet never has an opportunity to appeal to the electorate, the representatives reduce it almost to an ordinary committee whereas in Great Britain, where the cabinet regularly appeals over the heads of the representatives to the electorate, the representatives exercise very little control. The fact that parliamentary government in the countries where it has been tried has become too much the one thing or the other is one of its greatest weaknesses. Parliamentary government is simple in its workings, and, thereby, lightens the task of the voters. There is always the fixed responsibility of the cabinet for the government of the day. Its party is responsible to the voters. There is no way of evading this. Every one knows who is responsible for what is or is not done. Elections are usually based on single issues because defeats or censures of the cabinet generally take place over some measure

<sup>37</sup> For suggestions for more effective control of the cabinet by the House of Commons, see J. Ramsay MacDonald, *Parliament and Revolution* (1920), 159-180.

<sup>38</sup> The Baldwin Government of Great Britain was largely independent of its own party by virtue of its large majority in the House of Commons.

or policy. When a single proposition is debated before the voters, there is hope of their becoming sufficiently informed to be able to express an intelligent opinion. Its main essentials may be stated as follows: (1) a two party system with each party strong enough to be an effective check upon the other—a party of the government and a party of the opposition; (2) a representative system that results in the membership of the representative body bearing a direct ratio to the voters; (3) a bicameral system with control of financial matters fixed in the representative house; (4) a cabinet mainly composed of the leaders of the party in power in the representative body and collectively responsible to it; (5) a balance between the cabinet and the representatives so as to prevent either from completely controlling the other; (6) a civil service system to give permanence and efficiency to administration and to advise ministers in matters of legislation.<sup>39</sup>

"Cabinet government", said Woodrow Wilson, "is government by means of an executive ministry chosen from the ranks of the legislative majority—a ministry sitting in the legislature and acting as its executive committee; directing its business and leading its debates; representing the same party and the same principles; bound together by a sense of responsibility and loyalty to the party to which it belongs, and subject to removal whenever it forfeits the confidence and loses the support of the body it represents."<sup>40</sup>

Some of the defects of the cabinet system are stated substantially as follows by James Bryce: (1) it intensifies party strife either over the political issues of the nation or for the offices of the government; (2) the theory of the opposition is that it will oppose only the bad measures of the cabinet; in fact it generally opposes everything that the Government proposes; (3) debate is prolonged by the opposition to defeat measures it dislikes or to cause the Government to make a poor showing at the close of the session; (4) the Government is likely to propose popular measures, not necessarily those required for the best interests of the nation, since its life depends upon the support that its proposals may attract; (5) it is unstable, its instability resulting from the development of party groups, including compromising programs, constant concessions, diffusion of responsibility, or lack of policy; (6) its concentration of power and consequent ability to act quickly give it no inherent quality that forces due consideration. "There is no secur-

<sup>39</sup> Cf. Burgess, *op. cit.*, II, 15.

<sup>40</sup> *The Public Papers of Woodrow Wilson* (College and State, edited by Ray Stannard Baker and William E. Dodd, 1925), I, 112.



ity," says Bryce, "for due reflection, no opportunity for second thoughts. Errors may be irretrievable."<sup>41</sup>

While the English Government is the truest example of parliamentary or cabinet government, the government of the United States is the best example of presidential or congressional government.<sup>42</sup> The executive and legislative body are separate; if the executive controls the legislature, it is presidential government; if the legislature controls the executive, it is congressional government.<sup>43</sup> The President is independent of Congress because his powers are fixed in the Constitution which it cannot change. Congress is for the same reason free from the control of the President.<sup>44</sup> The terms of office of both are constitutional matters, and, therefore, neither can drive the other from office. While each can interfere with the will of the other—the President can veto the acts of Congress which can pass them over his veto—this has no effect on the term of office of either.

When the President is the political boss of the party in power in Congress, he will largely control Congress and the system becomes Presidential government. The President recommends legislation by means of special messages, induces his friends to introduce his legislative proposals into Congress, and sends his secretaries to the committee rooms to urge their acceptance. He holds conferences at the White House with the leaders of the houses and thus personally urges the importance of keeping the party pledges. His friends come to Washington to help him. Clubs by the hundreds, chambers of commerce, and organizations throughout the country rally to his support. The appointment power and the threat of the veto are also used. While this is presidential government to the hilt, it is party government and a close approach to cabinet government with the President as prime minister. It might more accurately be called Presidential-Congressional government.

In this system, the President alone is responsible for administration to the people whereas in the parliamentary system, the cabinet is collectively responsible to the parliament.<sup>45</sup> In the former the cabinet is only an advisory body to the President who is the head of both the state and the government; in the latter the cabinet

<sup>41</sup> *Op. cit.*, II, 468.

<sup>42</sup> It has also been called government by committees because committees control the legislative bodies.

<sup>43</sup> Willoughby and Rogers, *op. cit.*, 323-333.

<sup>44</sup> Woodrow Wilson, *Congressional Government* (1885), 295-333.

<sup>45</sup> See Goodnow, *op. cit.*, 114-125, for a comparison of presidential and cabinet government.



is the government and is composed of equals, the prime minister being only *primus inter pares*.

The cabinets in the two systems bear different relations to the legislative body. In the presidential system the cabinet heads are not members of the legislative body, do not frame the legislative program, and cannot propose legislative measures or participate in debate, as the system now functions in the United States. In the parliamentary system these matters are their chief duties, and, they are, therefore, either members of the legislative body or have seats in it with the right to vote to enable them to perform these functions. In the presidential system, the legislature has no constitutional or political means except by impeachment, which is totally ineffective, to force the resignation of the President or the cabinet, while in the parliamentary system, the cabinet cannot remain in power without the support of the members of the lower house of parliament.<sup>46</sup>

Another very significant difference between the two systems is that in the presidential system, the party organization is outside the government and constitutes a sort of invisible and irresponsible government, while in the parliamentary system, the party organizations constitute the Government and the Opposition. The former is indirect and the latter is direct party government.

Possibly the chief feature of each system was expressed by Bagehot in the following: "The independence of the legislative and executive powers is the specific quality of Presidential Government, just as their fusion and composition is the precise principle of Cabinet Government."<sup>47</sup> "It is evident from a comparison of the cabinet and presidential government," says Haines, "that cabinet government can be improved by the application of principles now made a definite part of the presidential system and that presidential government can be improved by taking advantage of the well-known practices which have proved so successful in the countries with a cabinet government. Each has advantages which deserve continuance and development. The combination of the features of both plans is apparent in a number of recent constitutions.

"Certain tendencies are particularly notable in recent constitutions. These are marked enough to merit listing: (1) To create a

<sup>46</sup> A. V. Dicey, "A Comparison between Cabinet and Presidential Government," 85 *Nineteenth Century*, 85.

<sup>47</sup> Walter Bagehot, *The English Constitution, and Other Political Essays* (1924), 84. See this brilliant work for an illuminating comparison of the cabinet and presidential systems, 69-100.

semi-independent executive, but to require ministers to assume responsibility for all important political acts of the President either individually or collectively before the legislative chambers. (2) To give the ministers free access to the legislature to take part in debates, to present measures and, if members of the legislature, to vote. (3) To place upon ministers the duty of preparing the budget, and the responsibility of formulating laws and presenting them to legislative bodies.<sup>48</sup>

There are two features of cabinet government which, if they were incorporated into presidential government, would undoubtedly improve it. They are (1) responsibility of the executive to the legislature and (2) a direct contact between the two as a means of enforcing this responsibility. The tendency throughout the world toward stronger executives makes it imperative for a stronger control to be exercised over them. The problems of modern society are such as only administrative agents with the rule-making power with the effect of law can handle satisfactorily. This increased jurisdiction of administration calling for thousands of experts is making a bureaucracy of the administrative side of government. It may as well be admitted that this tendency is inevitable under present conditions and that it is not in its last stage of development. The character of this work is such as to make intelligent control almost impossible. Certainly only partial control by the representative agent of government is possible or desirable, but the presidential type of government as practiced in the United States does not make provision for more than a gesture in this direction.

To provide the contact to make this control possible, the members of the President's cabinet should be given seats in Congress with the power to introduce measures concerning their respective departments and to debate their merits. Congress would then have an opportunity to criticise, modify, or veto such measures. Legislation would result from the combined knowledge and wisdom of both congress and the executive. Congress would also have the opportunity to quiz the cabinet members at any time about administrative policies and acts which now it can do only indirectly at spasmodic times when some scandal in government circles that almost shakes the faith of our people in our half-hearted and superficial attempt at democratic government is discovered.

The effect of such changes would be (1) to increase the control of Congress over the entire process of government by broadening its scope as well as making it more intelligent and consequently

<sup>48</sup> *Op. cit.*, 208-9.

more effective; (2) to increase party responsibility because debate over the policies of the government would take place on the floors of Congress and parties would be forced to declare themselves in the open; and (3) to convert the invisible government, which is our actual government, into a constitutional government. In round numbers, the last result would be the great achievement of these changes—the harmonization of constitutional and actual government.<sup>49</sup> Our constitution was drafted with the deliberate purpose in mind to prevent party government or government by the majority. In attempting to prevent government by the majority, it practically established government by the minority. This prevents party government from working on a constitutional basis. The fact is a new government invisible<sup>50</sup> to the constitution has developed. Why not recognize it when this could be done by a mere resolution of Congress?

<sup>49</sup> See *Senate Report*, No. 837, 46 Congress, 3d. Session (February, 1881), and a series of articles by Chester H. Rowell on "The Next Step in Washington", 49 *Worlds Work*, 155, 311, 400, and 553.

<sup>50</sup> See William Bennett Munro, *The Invisible Government* (1928), 85-112.

## Part II

### National Government





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## CHAPTER III

### THE GENESIS OF AMERICAN FEDERALISM

Federalism, strange as it may seem, is composed of two essential and yet apparently contradictory elements. The first is diversity and the second is uniformity. Federalism presupposes the existence of these conditions, and is usually the result of a process of unification covering a period of years, well illustrated in the history of Switzerland, Germany, the United States, Canada, and Australia. "There must exist, in the first place," says Dicey, "a body of countries such as the cantons of Switzerland, the colonies of America, or the provinces of Canada so closely connected by locality, by history, by race, or the like, as to be capable of bearing, in the eyes of their inhabitants, an impress of common nationality."<sup>1</sup> Federalism, however, may result from decentralization as in the cases of Mexico, Brazil, and Argentina.<sup>2</sup>

In the United States, federalism evolved through a period of almost two hundred years as the result of the interplay of the forces of variation and unification. Our federalism was not "struck off at a given time by the hand and purpose of man" as an eminent English statesman said,<sup>3</sup> but was a slow and painful process, beginning almost contemporaneously with the planting of the colonies by the English Crown in North America and continuing until it found adequate expression temporarily in the Articles of Confederation, 1781, and more permanently in the Constitution of 1787.

<sup>1</sup> A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (1924), 137.

<sup>2</sup> H. G. James and P. A. Martin, *The Republics of Latin America* (1923), 146 ff., and 172 ff., 350 ff.

<sup>3</sup> William E. Gladstone (1809-1898) said that the American Constitution was "the most wonderful work ever struck off at a given time by the brain and purpose of man." This was at first considered complimentary by the Americans, but later it was realized that the distinguished statesman regarded our federalism as a hot-house plant, when as a matter of fact it was the product of the experience of the English at home and of the English colonists in America.

Federalism is essentially a process or method, and as such must constantly yield to modification by the dominating forces of society both economic and political. It is not static but dynamic or progressive; hence the federalism of 1787 is not the federalism found in our society or Constitution at the present time.

There are always two federalisms in any federated society—the one is actual or real and is *economic* in character and the other is formal and is *political* or *legal* in its nature. The one is basic and represents the social structure of society; the other is secondary and finds its expression in the constitutional form of society. Economic federalism is a natural evolution, while formal or constitutional federalism is usually established by agreement, and may or may not be a true expression of the actual structure of society.

The establishment of formal federalism is, therefore, a very difficult problem. It involves a scientific analysis of society to discover its structure. This constitutes the raw material of the formal or legal order which should be as nearly as possible a replica of the economic order, in order that society may properly function through its governmental system. In other words, government is in the main the formal dress for the economic man.<sup>4</sup>

Provincialism was the first basis of our federalism to develop, and it was the controlling force in the social, religious, and political life of Colonial America. Frontier life demanded individual initiative. The physical task of conquering nature produced an individual who did not feel the need of coöperation. Geographical isolation prevented social intercourse, checked the exchange of ideas, and fostered the development of self-sufficient communities.<sup>5</sup>

Education and religion expressed themselves in marked variations. New England promoted public schools for the masses and the South fostered private schools for the few. The colonies were founded by different classes of people and for different purposes. These purposes tended to emphasize other differences as when the New England colonies refused to associate politically with Rhode Island because of her religious belief. Theocratic New England with practically self-government differed very widely from Catholic Maryland under Baltimore and Anglican-aristocratic Virginia under Berkeley.<sup>6</sup>

Local pride jealously guarded the community's conception of

<sup>4</sup> Charles A. Beard, *The Economic Basis of Politics* (1922), *passim*; See also *Federalist*, No. 10.

<sup>5</sup> E. B. Greene, *Provincial America* (1905), 63-82.

<sup>6</sup> D. S. Muzzey, *The United States of America* (1922), I, 12.

life and its institutions. Boundary disputes, tariff wars, different labor systems and classes of society, unequal participation in colonial wars, changes in the administration of the home government, such as the downfall of Charles I, the Restoration, and the Revolution of 1689, which generally exaggerated existing differences among the colonists, social diversity, refugee problems, extradition of criminals, quarrels over the navigation of rivers, and conflicts over expansion of settlements were among the subjects of almost constant contention.

There was also considerable variation in their political institutions despite the uniformity that characterized their form. There were a governor, a legislative body, courts, and local officers in each colony, but in powers of control, methods of securing office, and relation to the home government, the colonial governments differed rather widely. In Massachusetts to 1684, Rhode Island, and Connecticut, there was practically complete self-government; in Pennsylvania, Delaware, and Maryland, a proprietor either acted as governor or appointed the governor; and in the larger group of royal colonies, the crown of Great Britain appointed the governors. In the southern colonies there was no local self-government; the officials of the counties were appointed by the local governors.<sup>7</sup>

Contemporary with the development of these forces of variation, there were strong agencies at work for federation. Since federalism works as the principal of the balance of power between the forces of diversity and uniformity, it must be recognized that both of these movements are equally constructive.

Social unity was promoted by many internal forces among which were the frontier producing economic and social equality; <sup>8</sup> growth of population connecting isolated groups and multiplying contacts; expansion of trade; improvement of transportation; establishment of an intercolonial postal system in 1710; oneness of language; predominance of the English settlers with their common law and political ideas; and association in intercolonial wars. "By 1739, a complete series of post routes had been established from Portsmouth, New Hampshire, to Charleston, South Carolina, and, with increasing population, the wilderness intervals between successive stations were gradually getting shorter."<sup>9</sup>

<sup>7</sup> C. M. Andrews, *Colonial Self-Government* (1904), *passim*.

<sup>8</sup> E. L. Bogart, *The Economic History of the United States* (1913), 87-88.

<sup>9</sup> E. B. Greene, *The Foundations of American Nationality* (1922), 339.

External forces were driving the colonists to the recognition of an interdependence. Numerous Indian wars; the presence of the French and Dutch; the coercive policy of the home government in trade; the extension of the provincial system by the withdrawing of the charters from the colonies; restriction on westward expansion; and annoying legislation of an imperial character by Parliament were all common problems and could be solved only by coöperation. Every Indian outbreak drove the colonies closer together. Of even greater importance as a unifying force was the series of wars between England and various nations of Continental Europe.<sup>10</sup>

During the colonial period, the spirit of union formally expressed itself sometimes in actual unions, frequently in attempts at union, and occasionally in acts of union. The first union of a federal nature among the colonists was established in 1639 by the confederation of the separate communities of Windsor, Weathersfield, and Hartford under a constitution known as the Fundamental Orders of Connecticut which is recognized as "the first written constitution known to history that created a government."<sup>11</sup> These communities had organized governments of their own, but feeling the need of greater strength as a result of their frontier situation or the hostility of their Dutch and Indian neighbors, their representatives came together in the Hartford Convention in 1639 on their own initiative and established a government that was later recognized by Charles II in the charter of 1662 and finally became the state government of Connecticut after the American Revolution. It furnishes the model for the famous Connecticut Compromise of the Federal Convention of 1787 which, as we shall later see, largely determined the character of our national government. It was a compromise between local units of government.

Our interests lie chiefly in the federal features of this experiment. Each town was equally represented in the assembly by four deputies elected by their voters. The qualifications for voting or the suffrage were determined by the towns, the authority of the people was recognized as sovereign, and, therefore, they made the distribution of powers between the central and local governments. Local matters were retained by the town governments, and general matters, including taxation, Indian affairs, land policy, war, and

<sup>10</sup> A. M. Simmons, *Social Forces in American History* (1913), 57.

<sup>11</sup> For a copy of this constitution, see William Macdonald, *Select Charters Illustrative of American History* (1606-1775), 60-65; see also James Bryce, *The American Commonwealth* (1922), I, 428, footnote, 1.



peace, were placed under the jurisdiction of the federal government.<sup>12</sup>

There were other features of this plan, not of a federalistic nature, that represented lines of development which later in a modified form, were permanently incorporated in our constitution. A single executive was provided with a one-house legislative body, in which, however, there were two types of representatives—one of population and the other of the units of local government. By separating these elements and giving each representation in separate houses, the basis of our present congress is discovered—a national house of representatives and a federal senate. The will of the majority was the supreme law of the commonwealth—a provision not entirely unprophetic of the solution of the problem of coercion by the Federal Convention of 1787 by the adoption of the supreme-law-of-the-land clause of our present Constitution. The provisions of the Fundamental Orders indicate a remarkable knowledge of the nature of federal government on the part of its framers and constitute a document that enjoys “the distinction of being the first written political constitution in which the functions of government are formulated in detail.”<sup>13</sup>

The New England Confederation, established in 1643 and composed of the colonies of Massachusetts Bay, Plymouth, Connecticut, and New Haven, was a federal union of still larger proportions. The conditions that created this union were: (1) the desire for religious freedom; (2) the isolation of the different colonies preventing the establishment of a unitary government; (3) the hostility of the French on the north, the Dutch on the west, and the Indians in their midst; (4) the revolutionary condition of the home government; and (5) the recognition of the need of a common agency to handle certain problems of an intercolonial character such as commerce, labor fugitives, and criminal refugees.<sup>14</sup> Necessity rather than choice was the unifying force.

The principle of equal representation of the local unit in the central government, practiced by the Connecticut experiment, was continued by the New England Confederation and extended in its application to the colonies despite the fact that Massachusetts Bay had more population than the other three colonies combined. Here is a recognition of the legal equality of separate political entities

<sup>12</sup> Breckinridge Long, *Genesis of the Constitution of the United States* (1926), 29-41.

<sup>13</sup> Edward Channing, *History of the United States* (1909), I, 404.

<sup>14</sup> *Ibid.*, 416.



that was the basis of the establishment of the present American Senate.

The style of the union was "The United Colonies of New England." Its government consisted of a single house legislature composed of two delegates elected by the assembly of each colony, and possessing the power "to hear, examine, weigh, and determine all affairs of war, or peace, leagues, aydes, charges, and numbers of men for war, division of spoyles, or whatsoever is gotten by conquest, receiving of more confederates, or Plantations into combination with any of these Confederates, and *all things of like nature, which are the proper concomitants, or consequences of such a Confederation, for amity, offense, or defense*, not intermeddling with the Government of any of the Jurisdictions, which by the third article, *is preserved intirely to themselves.*"<sup>15</sup> It is noticed that the powers of the union were very broad and that there are also found in the two italicised parts in both their nature and phraseology the elements of the implied power and restrictive clauses of our present Constitution.<sup>16</sup> There was no executive for the union; one of the delegates was elected chairman of their meetings.

The articles of union were not adopted by the inhabitants *en masse* as was the case with the Connecticut Constitution, but by delegates of the colonies in convention; however, the articles became binding on Plymouth only after ratification by her legislature. The admission of new members required the unanimous consent of the delegates; Maine, New Hampshire, and Rhode Island were refused admission because of their social and religious practices. To accomplish the ordinary purposes of the union, the consent of only six of the eight delegates or commissioners was required. The union lasted forty years, conducted New England through the most destructive Indian war of the seventeenth century, and made a treaty with the French of Nova Scotia in 1644.<sup>17</sup>

While the unions of the Connecticut towns in 1639 and of the New England colonies in 1643 were the only successful efforts at confederation made by the colonists before the Revolution, there were several schemes for union suggested during this period that indicate the prevalence of the spirit of union and the progress of federalism. In general these proposals advised the establishment of a federal union of the American Colonies within the British

<sup>15</sup> Macdonald, *op. cit.*, 97-98.

<sup>16</sup> The italics are the author's. For comparison of these clauses, see the Constitution of the United States, Art. I, Sec. 8, and Art. X under amendments.

<sup>17</sup> Long, *op. cit.*, 51-53.

Empire largely to facilitate their control by the British crown, and, therefore, were not generally regarded favorably by the colonists.<sup>18</sup> They pointed toward an imperial federalism.

The plan that was most representative of this development of federalism within the Empire was proposed by Benjamin Franklin at the Albany Congress in 1754 as a solution of the problem of interrelations among the colonies and of their relations with the mother country.<sup>19</sup> Franklin's plan as modified by the congress became known as the Albany Plan. Briefly, it provided for a President General, appointed and paid by the Crown, and a Grand Council, composed of representatives of the colonies selected by their assemblies for a term of three years and proportionate in number to the amount of taxes paid by each colony for the support of the general government, with the provision, however, that no colony should have less than two representatives. Legislative measures originated with the Grand Council, but required the approval of the President General to become law. They were still subject to the veto of the Crown, which might be exercised at any time within three years of the passage of the law.

The federalism of the scheme was established by a division of powers between the central government in America and the mother country on the one hand and the colonies on the other. The laws passed were "not to be repugnant, but as near as may be agreeable to the Laws of England",<sup>20</sup> and each colony was to retain its constitution except in so far as the act of union modified it. The general government was given jurisdiction of war, peace, and commerce with the Indians, the purchase of land from the Indians, the establishment and regulation of new settlements, the raising and maintenance of armies for common defence, equipment of vessels for the protection of the coasts and trade on the ocean, the

<sup>18</sup> All New England, New Jersey, and New York were placed under one governor by James II; the Board of Trade of the Privy Council in 1696 suggested the uniting of the colonies; William Penn in 1697 proposed a plan for the union of the colonies under a King's Commissioner with an American Congress composed of two deputies from each colony; Robert Livingston in 1701 suggested placing the colonies under one form of government; the plan of the Earl of Stair in 1721 provided for a Captain General and General Council composed of two delegates from each colony; the Lords of Trade in 1721 and Daniel Coxe in 1741 proposed the centralization of the control of the colonies under a single governor.

<sup>19</sup> Twenty-five delegates from the colonies of New Hampshire, Massachusetts, Connecticut, Rhode Island, New York, Pennsylvania, and Maryland met at Albany in 1754 at the request of the Lords of Trade to hold a conference with the Six Nations. While at this conference, the Albany Plan was proposed.

<sup>20</sup> Macdonald, *op. cit.*, 257.

levying of taxes and import duties, and the making of such laws as related to the general affairs of the colonies.<sup>21</sup>

This was an effort to solve the problem of both imperial and intercolonial relations, and, while the proposal was unanimously adopted by the delegates at the Congress, it was later rejected by the mother country for giving too much home rule to the colonies and by the colonies for leaving too much authority to the mother country. If it had been adopted, it would have been a working basis, which, with modifications based on experience, might have prevented the schism in the Empire occasioned by the American revolution.

This plan is of special significance in the history of federal government, not only because it embodied principles which were later to be given permanent setting in our own Constitution, but also because it furnished still more nearly a model for the federal constitution of modern Canada and Australia. For the latter reason, Benjamin Franklin has been called one of the founders of the British Empire now known as the Association of British Commonwealths.<sup>22</sup> Franklin submitted a modification of this plan to the Continental Congress July 21, 1775 as a basis for a confederation of the American states in case they declared their independence.<sup>23</sup>

In the various plans for union proposed from 1639 to 1754 certain fundamental principles of our political institutions were in the process of development. A single executive with a limited veto, who was to be the head of civil administration as well as the military forces, had been suggested.<sup>24</sup> He was to participate in treaty-making and the appointment of both the civil and military officers. Two types of representation had been proposed—one of units of government and the other of population—both of which are incorporated in our national government, the one in the Senate and the other in the House of Representatives. The ideas of an equal and a varying representation had been presented. Also,

<sup>21</sup> Long, *op. cit.*, 127-122; see also 8 *Am. Pol. Sci. Rev.*, 395-411 (1914); and Franklin's *Works* (Bigelow Ed.), 219, 220, and 384.

<sup>22</sup> Benjamin Franklin and William Pitt, Sr., are regarded by educated Britishers as the founders of the British Empire. When Lord Durham made his report on Canada in 1839 and recommended a form of government for Canada, he only slightly modified the Albany Plan. Lord Durham's report is said to have been the most frequently quoted state paper of the nineteenth century.

<sup>23</sup> 8 *Am. Pol. Sci. Rev.*, 395.

<sup>24</sup> He was called a King's Commissioner by the Penn Plan and a President General by the Albany Plan. It was only a little distance to go from a President General to a President who is commander-in-chief of the Army and Navy.

the representatives of the units of government were to be selected by their assemblies as was the practice under the Articles of Confederation and the present Constitution until 1913.<sup>25</sup> All of these plans made provision for a single-house legislative body which was a feature of the Confederation from 1781 to 1778 and was suggested by the purely federal scheme of the little states in Federal Convention of 1787 as the proper basis for our present Congress. The doctrine of a limited government, limited by charters or Royal instruction in the colonies, by the rules of English law, by a written constitution for the general government, by a veto of the executive in both the central and colonial governments, and by the veto of the British Crown was a matter of practical experience and was incorporated in these proposals. The principle of checks and balances was also prevalent. Throughout this period of constitution making, Americans were learning how to draw the line of federalism—the most difficult line the genius of man has ever drawn—the line that separates the powers of a general or national government from those of local or state governments. The keeping of this line properly drawn in harmony with the actual structure of society is a constant problem of all federal systems of government.

The spirit of union developed more rapidly after 1754 due to the coercive policy of the home government,<sup>26</sup> and to an increased feeling of nationality among the colonists. This spirit expressed itself in such acts of union as the Stamp Act Congress of 1765, the non-importation agreements of 1765 and 1769, the intercolonial system of correspondence of 1773, and the Association of 1774, which was adopted by the First Continental Congress October 20, 1774, and signed by fifty-three of its members.<sup>27</sup> It was really a commercial union, and was the precursor of political union. It embraced all the colonies and bound their representatives in Congress and their constituents.<sup>28</sup> It provided for an economic boycott of Great Britain and was a declaration of commercial independence temporarily. It provided for non-importation, non-exportation, and non-consumption of British goods and for the establishment of the machinery to enforce its provisions. Abraham

<sup>25</sup> The Seventeenth Amendment, adopting the method of popular election of United States Senators, was proclaimed May 31, 1913.

<sup>26</sup> This policy was expressed in such legislative measures of Parliament as the Stamp Act of 1765, the Townshend Acts of 1767, and the Intolerable Acts of 1774.

<sup>27</sup> Macdonald, *op. cit.*, 362-367. These commercial agreements were united efforts of the colonies to secure the repeal of obnoxious legislation by the British Parliament.

<sup>28</sup> *Ibid.*, 364-366.



Lincoln said that the establishment of the Association of 1774 marked the birth of the American union.

While the First Continental Congress was in session, Joseph Gallaway, a delegate from Pennsylvania, proposed a scheme of Imperial Union in which there was provision for a federation of the American colonies. It was a slight modification of the Albany Plan, containing like it a proposal for a President General, appointed by the Crown, and a Grand Council, composed of delegates elected every three years by the colonial assemblies, but further suggesting that the Grand Council be a subordinate legislature to the British Parliament. Either, however, was to have authority to originate measures concerning either Great Britain or the colonies, but the approval of both was necessary for their validity.<sup>29</sup> This plan lacked only one vote of adoption by Congress. "Had it been adopted, the disruption of the British Empire by an American schism would certainly have been averted for that epoch, and, as an act of violence and of hereditary unkindness, would perhaps have been averted forever."<sup>30</sup>

Franklin in July, 1775, proposed a constitution for a confederation that was to operate until Great Britain redressed the grievances of the colonies. According to this plan congress was to consist of delegates elected annually by the colonial assemblies and to have charge of wars, peace, alliances, foreign affairs, inter-colonial disputes, new colonies, inter-colonial and foreign commerce, financial affairs, and post office. Executive authority was to be exercised by a council of twelve, elected by Congress for terms of three years with one-third of its membership retiring annually. The council was to propose measures for the consideration of Congress and to administer the government between the sessions of Congress. The plan was referred to a committee of Congress, but out of deference to the conservatives led by John Dickinson, it was never reported for debate by Congress.<sup>31</sup> Its purpose was to constitutionalize the powers of Congress rather than to establish a permanent government. It is significant for its federalism and its general provisions that constitute a link in the long chain of evolution of our constitutional system.<sup>32</sup>

<sup>29</sup> *Journals of Congress*, I, 49 ff.

<sup>30</sup> Moses Coit Tyler, *The Literary History of the American Revolution* (1898), I, 373.

<sup>31</sup> *Journals of Congress*, II, 195.

<sup>32</sup> See J. A. C. Chandler, *Genesis of the Birth of the Federal Constitution* (1924); and Allan Nevins, *The American States During and After the Revolution, 1775-1789* (1924), 606-678.

## CHAPTER IV

### THE ARTICLES OF CONFEDERATION

The movement for confederation of the colonies prior to 1775 had for its object the establishment of a general government in America to act as the common agent of the colonies and Great Britain in the control of intercolonial affairs on the one hand and inter-imperial relations on the other. It failed because no satisfactory distribution of powers between the proposed American government and that of Great Britain was made. Failure to solve the problem of federalism within the Empire ended in the taking of steps to solve it without. These steps were (1) the severance of political connections with Great Britain, (2) the substitution of state governments for the former colonial governments, and (3) the establishment of the confederacy under the Articles of Confederation. This constitutes the formal program of the American Revolution.

To accomplish this program a new political organization was necessary because the colonial governments were in the hands of British authorities, and, therefore, could not be used for revolutionary purposes. In November, 1772, a town committee system of correspondence was organized at Boston by Samuel Adams and in March, 1773, a colonial committee system was started by Thomas Jefferson in Virginia, which, within a year, had been adopted by twelve colonies.

These committees constituted a network of political machinery that at first was intended to unite the colonies in resistance to the home government with a view of changing its policy, but, failing in this, they became the means of revolution and the nucleus of a new political order.<sup>1</sup> In fact, after their establishment, each colony had two governments: the one American and revolutionary and the other British and legally constituted. The governments of the radicals were better obeyed, said Burke in 1775, than the

<sup>1</sup> E. D. Collins, "Committees of Correspondence of the American Revolution," *Annual Report of the Am. Hist. Soc.* (1901), I, 247 ff.

regular governments of the colonies.<sup>2</sup> Jefferson called these committees little republics.<sup>3</sup>

It was these committees or other revolutionary groups under their influence that selected and instructed the delegates to the continental congresses, which, therefore, became the agents of these local groups. It was a revolutionary body because it was brought into existence by these revolutionary groups without the permission of the British government or the colonial assemblies.<sup>4</sup> It became the directing agent of the activities of these groups in domestic affairs.

The Second Continental Congress that met May 19, 1775, issued the Declaration of Independence July 4, 1776, severing the political relations between the colonies and Great Britain. The congress performed this act as the common agent of these organized groups in the individual colonies whose delegates were acting under their instructions and its effect was to establish the former colonies as independent communities. In 1796, Mr. Justice Chase, speaking of the Declaration of Independence, of which he was a signer, said: "I consider this as a declaration, not that the United States *jointly*, in a *collective* capacity, were independent states, &c., but that *each* of them was a *sovereign* and *independent state*, that is, that *each* of them had a right to govern itself by its own authority, and its own laws, without any control from any other power upon earth."<sup>5</sup>

These communities were now in a position to establish permanent governments. However, before independence was declared, temporary governments had been established in Massachusetts, New Hampshire, and South Carolina upon the advice of congress because the colonial governments were not obeyed and the revolutionary organizations were without legal authority.<sup>6</sup> In May, 1776, Congress resolved "that it be recommended to the respective assemblies and conventions of the United Colonies, where no government sufficient to the exigencies of their affairs has been hitherto established, to adopt such government as shall, in the *opinion of the representatives of the people*, best conduce to the happiness and safety of their constituents in particular and Amer-

<sup>2</sup> "The new institution is infinitely better obeyed than the ancient government ever was in its most fortunate periods." Edmund Burke, *Works*, II, 128.

<sup>3</sup> D. S. Muzzey, *The United States of America* (1922), I, 70, footnote, 4.

<sup>4</sup> See Joseph Story, *Commentaries on the Constitution of the United States* (Fifth Ed., 1891), I, 201, and J. R. Tucker, *Constitution of the United States* (1899), I, 206 ff.

<sup>5</sup> *Ware v. Hylton* (1796), 3 Dallas 223.

<sup>6</sup> *Journals of Congress*, June 9 and November 3 and 4, 1775.

ica in general.”<sup>7</sup> Virginia was the first to follow this suggestion of Congress, adopting her constitution more than a fortnight before the Declaration of Independence was issued; New Jersey issued her constitution on the day the motion for independence was adopted by Congress; six other states followed in 1776; two in 1777; and South Carolina, Massachusetts, and New Hampshire remade their temporary governments by adopting permanent constitutions in 1778, 1780, and 1784, respectively.<sup>8</sup>

These first state constitutions represent the results of a period of constitution making on the largest scale known to history. They were based on the English constitution, the common law, colonial experience, and political philosophy, and constitute the foundations of our present state and national constitutions. They made a unique and distinctive contribution to the field of practical government.

The governments established by these constitutions followed in the main the outlines of the colonial governments. They consisted of an executive elected by the voters in the six more northern states and by the legislature in the six more southern and New Jersey; a representative legislature bicameral in character except in Pennsylvania and Georgia; and a judiciary indirectly selected. These constitutions were further characterized by bills of rights, popular sovereignty, separation of powers, checks and balances, and short terms of office. These features are still found in our state constitutions and have been introduced into the Constitution of the United States.<sup>9</sup>

The *de facto* governments of the revolutionary period were now *de jure* governments. The American Revolution had been accomplished and the result was thirteen sovereign and independent states, though these states were revolutionary bodies from the point of view of international law until Great Britain conceded their independence. This was the transplantation of the European state system to America and it constituted the political foundation for federation which was already in process but was only in a *de facto* stage of development. Legally speaking, there was no United States of America in 1780; the continental congress which was brought into existence in 1774 as the agent of revolutionary organizations in the colonies had now become the agent of the states. It was

<sup>7</sup> *Ibid.*, May 10, 1776.

<sup>8</sup> Francis N. Thorpe, *American Charters, Constitutions, and Organic Laws* (1909), 7 vols.

<sup>9</sup> Allan Nevins, *The American States During and After the Revolution* (1924), 117-170.



composed of representatives of the states selected and instructed by their legislatures, and it acted under these limitations as their common agent in the administration of matters of mutual defense and foreign affairs. Fortunately, this is only one side of the story. It would have been a calamity if the European state system had remained permanent, as is the case in Latin America. The process of union, however, had become sufficiently strong to prevent it. If the American revolution had not been followed by war, the states might have remained independent temporarily, but undoubtedly union would sooner or later have resulted. On June the 7th, 1776, when Richard Henry Lee of Virginia under instructions to the Virginia delegation moved in the Continental Congress that the colonies be declared free and independent states, he included in his motion that "a confederation be formed to bind the colonies more closely together."<sup>10</sup> In other words, separation from Great Britain and confederation were united in a single proposition which the delegates of Congress had been instructed to accept. On June 11th, congress ordered "that a committee be appointed to prepare and digest the form of a confederation to be entered into between these colonies."<sup>11</sup> The next day a committee of twelve members was appointed.<sup>12</sup>

The work of the committee was a relatively simple task because confederation within the Empire had been a frequent subject of discussion since 1643. The problem after revolution was even less complicated in some respects, as two carefully formulated plans were already prepared. These were Franklin's proposal of July 21, 1775, and one prepared by John Dickinson, chairman of the committee. The committee reported July 12, 1776, and Congress debated its proposal periodically for almost a year and half, reaching an agreement in the late fall of 1777.

—This delay was due largely to the presence of war and the large volume of work of Congress, but also to serious differences of opinion that arose over four features of the committee's report.<sup>13</sup> These were (1) the giving of one vote to each state in Congress, (2) the apportionment of taxation according to population, (3) the western lands, and (4) the granting to Congress

<sup>10</sup> *Madison Papers*, I, 9.

<sup>11</sup> *Journals of Congress*, I, 370.

<sup>12</sup> The committee was inferior to the one that drafted the Declaration of Independence. Its leading members were John Dickinson of Delaware, Roger Sherman of Connecticut, Robert R. Livingston of New York, Samuel Adams of Massachusetts, and Edward Rutledge of South Carolina.

<sup>13</sup> Claude H. Van Tyne, *The American Revolution* (1905), 185-192.

of the power of arbitration over boundary disputes between the states.) Franklin vigorously opposed equality of the states, saying that it was against equity and justice, and proposing that the voting strength be proportional not only to population but also to the military and financial burdens sustained in maintaining the union. "Let the smaller colonies give equal money and men," he said, "then have an equal vote." It was contended in reply that the proposed government would be federal and not unitary, that it was a mere league of friendship for specific purposes, and that each member, therefore, should have one vote. Congress finally decided in favor of equality of the states in Congress.<sup>14</sup> The Southern representatives objected to the counting of both the whites and the blacks as a basis for the apportionment of taxation. They maintained that slaves were property, and were, therefore, in the class with sheep, horses, and lands. It was finally decided that the expenses of the Confederation should be defrayed by a common treasury "supplied by the several States, in proportion to the value of all land within each state, granted to or surveyed for any person."<sup>15</sup>

The western land question resolved itself into a contest between the landed and landless states. Seven states, Massachusetts, Connecticut, New York, Virginia, the Carolinas, and Georgia claimed western lands on the basis of their old charters and Indian treaties. Maryland led the opposition, contending that these lands should become the property of the Confederation, but Congress decided "that no States shall be deprived of territory for the benefit of the United States."<sup>16</sup>

The matter of making Congress a final court of appeal for the settlement of boundary disputes produced a new alignment of the states because this question was not related to either the size or population of the states. It was one problem that was not a matter of either federalism or nationalism. There were states like Georgia, with a small population and extensive land claims, and Pennsylvania, with a large population and no land claims. Would a little

<sup>14</sup> The following table taken from the *Pennsylvania Packet*, December 11, 1786, shows the meaning of this contest. It would have given the control of Congress to Massachusetts, Pennsylvania, Maryland, and Virginia, which would have had 41 votes while the other nine states would have had only 35. This same contest arose in the Federal Convention of 1787. See Edward Channing, *History of the United States*, III, 451.

<sup>15</sup> *Articles of Confederation*, Art. VIII. A copy of the Articles of Confederation may be found in Macdonald's *Select Documents Illustrative of the History of the United States (1776-1861)*, 6-15.

<sup>16</sup> *Ibid.*, Art. IX.

state prefer to settle its land disputes with a big state single-handed or to take its case before Congress? Which of these two methods of settlement would a big or a little state with no land claims prefer to be adopted? Finally Congress was given jurisdiction over disputes between the states.

Congress adopted the Articles of Confederation November 15, 1777, and ordered that they "be proposed to the legislatures of all the United States, to be considered, and if approved of by them, they are advised to authorize their delegates to ratify the same in the Congress of the United States; which being done, the same shall become conclusive."<sup>17</sup> Two days later, Congress issued a letter to accompany the Articles, urging that they "be examined with a liberality becoming brethren or fellow citizens surrounded by the same imminent dangers, contending for the same illustrious prize, and deeply interested in being forever bound and connected together by ties the most intimate and indissoluble; and finally, let them be adjusted with the temper and magnanimity of wise and patriotic legislators, who, while they are concerned for the prosperity of their own more immediate circle, are capable of rising superior to local attachments, when they may be incompatible with the safety, happiness, and glory of the general confederacy."<sup>18</sup>

Notwithstanding this eloquent appeal of Congress and the imperative need of a closer organization to win the war still in progress, to gain the respect and support of foreign powers, to achieve independence, and to negotiate a satisfactory settlement with Great Britain, it required nearly three and one-half years to secure the ratification of the Articles by the legislatures of the states. Eleven states consented to the Articles within a year; Delaware in 1779; and Maryland March 1, 1781, after she was promised that the western lands would be ceded to the Confederation. Congress met March 2 under the Articles, which marks the date of its transformation from a *de facto* to a *de jure* government.

The colonies created Congress in 1774 to act as their agent in affecting a satisfactory readjustment with Great Britain; failing in this, they declared themselves independent states through their instructed representatives in Congress.<sup>19</sup> Congress now became the agent of the states and the means by which they managed their common affairs such as raising armies, building fleets, levy-

<sup>17</sup> *Journals of Congress*, II, 334.

<sup>18</sup> *Ibid.*, II, 337.

<sup>19</sup> *Ibid.*, I, 2-7, 50-54.

ing taxes, borrowing money, and making treaties. The authority of Congress prior to 1781 was based on the credentials of its members, who were representatives of colonies prior to July 4, 1776, and of states thereafter. In cases of emergency during this period, Congress frequently acted on matters on which its members had no instructions from the states; in such instances, its acts were either tacitly accepted at the time or formally opposed later.<sup>20</sup> Congress, when acting under instructions from the state, was a diplomatic body, a sort of international congress composed of the instructed diplomats of the states; but, when acting without their authority, it "was a *de facto* federal government, acting for a real political entity known to the outside world as the United States of America."<sup>21</sup> The Articles of Confederation constitutionalized the powers of Congress.

The Articles were made by and for the states. They provided for a "firm league of friendship" of states and not of individuals. Each reserved "its sovereignty, freedom, independence and every power, jurisdiction, and right" not *expressly* delegated to the confederation, but agreed to coöperate with the others for purposes of common defense, general welfare, and the security of their liberties.<sup>22</sup>

The powers of the confederation were about the same as those previously exercised by the Continental Congress. Congress was given exclusive control of foreign affairs, value of coinage, weights and measures, postal service, Indian affairs not within any state, and a limited supervision over interstate relations. Without its approval, no state could make a treaty, send or receive diplomatic officials, engage in war except in cases of invasion, keep a standing army or navy, or make an agreement with another member of the confederation. Congress was also given jurisdiction of disputes between the states of whatever nature, which authority was to be exercised by a rather elaborate process of arbitration.<sup>23</sup> This feature of the Articles has been regarded as furnishing the model for an international court.

The most constructive steps taken were those directed toward the promotion of interstate comity and intercourse. "Full faith and credit" were to be given in each state "to the records, acts and judicial proceedings of the courts and magistrates of every other

<sup>20</sup> The delegates to Congress usually reported its action on important matters to their respective states whose legislatures generally approved.

<sup>21</sup> Greene, *op. cit.*, 559.

<sup>22</sup> *Articles of Confederation*, Arts. II, III.

<sup>23</sup> For the details of this process, see *Ibid.*, Art. IX.



state.”<sup>24</sup> Fugitives from justice were to be returned to the state in which their crimes were committed upon the demand of its executive. The citizens of one state were entitled to all the privileges and immunities of those of the several states. Here is a recognition of private international law and the beginnings of a national citizenship.

It was then and is still a matter of dispute as to the kind of government the Articles of Confederation established. Despite its weaknesses, it was the strongest union of its time. While John Adams called Congress a diplomatic body, a committee of which Jefferson was chairman declared in 1784 that the states had been “consolidated in one federal republic.” Congress instructed its foreign representatives to regard “these United States as one nation, upon the principles of the Federal Constitution.” The members of the Federal Convention of 1787 differed as to the meaning of the Articles, and the commentators and historians have continued the controversy to the present.<sup>25</sup>

Congress under the Articles continued to be a unicameral body in which each state was represented by not less than two nor more than seven delegates annually selected by the state legislatures and constantly subject to their recall. The delegates were paid by the states, could be reelected only twice within a period of six years, and voted as a delegation, each state thereby having only one vote regardless of the number of its delegates. The delegation decided in a caucus by majority rule how the vote of the state should be cast on any particular question. The presence of two or more delegates was required to cast the vote of a state, and, if only two were present and they differed from each other, the state lost its vote.

While the Articles of Confederation marked a distinct advance in the development of American federalism, they, nevertheless, provided for a very ineffective government. Its weaknesses were due to four main causes: (1) inadequate powers; (2) its lack of proper machinery; (3) its method of operation; and, (4) its rules of procedure.

Congress lacked the power of taxation, and therefore, had no revenue to do the things that it otherwise had the power to do. For this reason it could not pay the revolutionary soldiers, raise a new army, build vessels with which to protect the country against foreign invasion or itself from the encroachments of the

<sup>24</sup> *Ibid.*, Art. IV.

<sup>25</sup> See Story, *op. cit.*, I, 201 ff.

states. It could not regulate either domestic or foreign commerce except by commercial treaties which it could not enforce. This was a very serious weakness because the states soon began to wage a commercial war upon one another, and foreign nations, particularly Great Britain, took advantage of this chaos.<sup>26</sup>

✓ There was no executive or judicial department provided for the confederation. The administration of law was left to the states. Congress elected at each session one of its members to act as President, but he was merely a speaker of Congress, or a presiding officer. There was also provision for "a Committee of the States" to consist of a delegate from each state to act for Congress during its recesses, but it was a mere agent of Congress and in no sense comparable to a European cabinet. It should be remarked, however, that according to the plan of the confederation, there was nothing for an executive to do. If an executive and revenues had been provided, there would likely have been trouble between the Confederacy and the states. The American people were not willing at this time to accept a central government with the power to enforce its will.

A fatal weakness of the Confederacy was that it had no direct relation with the people. It operated on the states. It could exercise its powers only by permission of the states. It really could not pass laws but only resolutions which required for their validity the sanction of the states. ~~It was a government of states and not of the people.~~ Hamilton regarded the inability of the Confederacy to operate directly upon individuals as its greatest weakness.<sup>27</sup>

Finally, the above weaknesses were aggravated and their elimination prevented by certain rules of procedure which the Articles contained. It required the consent of nine states for Congress to exercise its more important powers. If only eight states were present, no business could be transacted, or if nine were present, one state could prevent action, or if one of the nine had only two delegates present, one of these could hold up the United States of America. In less important matters, the consent of a majority of the states was necessary. That is, for the consideration of such matters, a majority of the states constituted a quorum, but for action to be taken, unanimity of the quorum was required.<sup>28</sup> No change could be made in the Articles without the consent of nine states in Congress and ratification by the legislature of every state.

<sup>26</sup> John Fiske, *The Critical Period of American History* (1888), 144-147.

<sup>27</sup> *The Federalist*, No. XV.

<sup>28</sup> *Articles of Confederation*, Art. IX.

Lack of powers and inability to exercise those it possessed made Congress a debating society composed of ambassadors of sovereign and independent states.

It is not generally recognized that, during the life time of the Confederation, usually regarded as the "Critical Period" of American politics, a rather creditable amount of constructive work was accomplished. The Revolutionary War was brought to a successful termination, and a treaty of peace made with Great Britain in 1783, granting the independence of the United States with rather liberal boundaries.

The Confederacy continued to maintain a certain unity of the states despite its ever impending dissolution, and that of several of the states. Washington wrote McHenry, a delegate in Congress, August 22, 1785, that "We are one nation today and thirteen tomorrow." Maine was trying to secede from Massachusetts; Kentucky from Virginia; and the Franklin State from North Carolina. By means of the Confederacy through arbitration, boundary disputes were settled between Pennsylvania and Connecticut in 1782, and suits between Massachusetts and New York, and South Carolina and Georgia were arbitrated in 1786. But for the Confederacy, separation from Great Britain might have become the first step toward anarchy rather than union.

It was during the Confederacy that the domain of public lands was created by the ceding of lands to the Union by the states of New York (1781), Virginia (1784), Massachusetts (1785), Connecticut (1786), and South Carolina (1787),<sup>29</sup> and that Congress established a public land policy by the Land Ordinance of 1785. This act provided that no land could be sold until it was surveyed into townships, each six miles square, divided into thirty-six sections, each one mile square, and uniformly numbered, and that section sixteen in every township should be reserved for the support of public education. This general scheme became a permanent feature of our national land policy.

It was still more important for Congress to establish a form of government for the territories into which the public domain would be divided. This was done by the famous Ordinance of 1787, which has been called our second constitution because it provided a form of government for those who were to live outside the Union. Here as well as in the establishment of the land policy new ground had to be broken. Were these territories, which were colonies in fact,

<sup>29</sup> North Carolina and Georgia followed suit under the Constitution in 1790 and 1802, respectively.

to remain dependencies of the Union as was the customary relation of colonies to the mother country, or were they to be accorded membership in the Union on a basis of equality with the "Original Thirteen"? In deciding by the Ordinance of 1787 that territories might confidently look forward to statehood in the Union, the Congress of the Confederation established a new principle in the building of nations, and gave to the world ample evidence of a statesmanship of a very high order. It amounted to the extension of the federal principle to the territories.

While the Articles of Confederation made no provision for any permanent executive machinery, Congress learned from experience that such machinery was necessary and as a result laid the foundation for the establishment of the Presidency of the new Constitution. The exigencies of the war forced Congress to establish a number of committees or boards to handle administrative matters. The chairmen of these agencies were practically heads of executive departments, and so efficiently performed their duties that Congress saw the uselessness of the committee system and acquired a confidence in a single-headed department. August 29, 1780, Congress appointed a committee of five of which Robert R. Livingston was chairman to propose a plan of reorganization of its administrative agencies.<sup>30</sup> Hamilton and Washington convincingly urged the advantages of administration by heads of departments rather than by committees whose personnel was constantly changing and whose actions were marked by delay and indecision.<sup>31</sup> In accordance with the report of the committee, Congress on January 10, 1781, established a Secretary for Foreign Affairs and on February 6 of the same year a Superintendent of Finance, a Secretary at War, and a Secretary of Marine were set up.<sup>32</sup> The departments of War and Foreign Affairs remained permanent to Washington's administration.

The heads of these departments were permitted to appear on the floor of Congress in an advisory capacity, and, in fact, came to exercise considerable influence over it; especially was this true in the cases of Robert Morris, Superintendent of Finance, and John Jay, Secretary for Foreign Affairs. It may well be contended that Robert Morris from June, 1781, to November, 1784, and Jay from December, 1784, to 1790 was the chief executive of the Confederation.

<sup>30</sup> *Journals of Congress*, August 29, 1780.

<sup>31</sup> See Hamilton's *Works* (Ed. by Hamilton), I, 127, 154-59.

<sup>32</sup> *Journals of Congress*, III, 564, 575.



It was on the basis of these executive departments established by the continental congress and continued under the Confederation that the Federal Convention of 1787 was warranted in assuming that there would be executive departments as a matter of course, and, hence, only incidentally mentioned them in the present Constitution. The tendency for one of these executive heads to become in fact a chief executive may be regarded as prophetic of the American President. It was characteristic of the times to regard with suspicion the concentration of authority in the hands of one man; it smacked of monarchy. It was this successful experiment by the Confederation, begotten of necessity, that enabled the friends of strong government to establish in 1787 the most unique executive office to be found in the history of modern government.

#### THE MOVEMENT FOR A STRONGER GOVERNMENT

It was recognized by the leading statesmen of the revolutionary period that a reaction in the direction of political disintegration would inevitably follow the war or the granting of independence to the individual states by Great Britain. In fact, this tendency expressed itself in the Articles of Confederation drafted in 1781 before the war had closed or before independence had been secured by the Treaty of Paris of 1783. The friends of a stronger government anticipated this situation and began to advocate the strengthening of the central government before the ratification of the Articles of Confederation by the state legislatures. Among these may be mentioned Franklin, Washington, Jay, Hamilton, and Madison, men of influence and ability, who constantly from 1781 to 1787 called attention to the weaknesses of the articles, proposed schemes for a stronger government, and produced arguments for a new order convincing even to radical republicans like Sam Adams, Patrick Henry, Tom Paine, and Thomas Jefferson. The need for a new political order adapted to the conditions of the time became increasingly evident as new problems developed and was accurately and forcibly phrased in the Federal Convention of 1787 by Governor Edmund Randolph, of Virginia, later Attorney General of the United States, who said in substance:

"The Confederation was made in the infancy of the science of constitutions and confederacies; when the inefficiency of requisition was unknown; when no commercial discord had arisen among the States; . . . when no foreign debts were urgent; when the

havoc of paper money had not been foreseen; when treaties had not been violated; and when nothing better would have been conceded by States jealous of their sovereignty."

But it offered no security against foreign invasion, for Congress could neither prevent nor conduct a war; nor punish infractions of treaties or of the law of nations; nor control particular States from provoking war; check a quarrel between separate States; nor suppress a rebellion in any one of them; nor establish a productive impost; nor counteract the commercial regulations of other nations; nor defend itself against the encroachments of the States.<sup>33</sup>

The failure to remedy these defects in the Articles by the amending process aggravated the situation. In 1781 Congress proposed the Five Percent Amendment to enable it to collect an import duty to be used in paying the national debt. Rhode Island by means of the rule of unanimity of ratification of amendments prevented its adoption because she was attracting trade by a lower tariff than her neighbor states had. In 1783 Congress proposed the Revenue Amendment which was finally defeated by New York whose treasury was profiting from the duties on goods imported for use in other states. In 1784 Congress proposed the Commerce Amendment, asking for power to pass navigation acts against foreign countries which refused to make commercial treaties with the United States—a measure directed particularly against Great Britain—but this proposal was less favorably received by the states than the other two.

Meanwhile new conditions and forces were making the old order less stable. The monetary situation was thoroughly chaotic and threatened to undermine the financial and commercial interests of the nation. Congress during the Revolutionary War issued a large amount of paper money which by 1780 was worth less than two cents on the dollar in specie. Of this money, a pound of brown sugar was worth eleven dollars; a yard of linen seventy-five dollars; and a pound of tea one hundred dollars. Following the treaty of peace of 1783, the states continued the practice of issuing paper money without any specie basis, with the result that since the imports of the country had to be paid for in gold and silver there remained only a worthless paper money as the financial basis of the nation. Farmers became indebted to merchants and came to hate them as a creditor class. Taxes were heavier than before the

<sup>33</sup> Hunt and Scott, *Debates in the Federal Convention of 1787*, 22-23.

Revolution or were levied mainly upon lands. This hatred was extended to lawyers who attempted to collect debts and to the judges who insisted on payment or imprisonment according to law. This situation finally took the form of a sort of class war. Farmers, being in the majority, forced legislatures to issue paper money on farm mortgages and demanded that creditors accept it or suffer penalties. The creditors still refused to receive such money in payment of debts whereupon the farmers retaliated by not bringing their products to town, hoping thereby to coerce the merchants into accepting their system. The coinage of the nation presented a picture of hopeless confusion. It was very representative of foreign countries as well as the individual states. A man traveling through New England received in change for one English crown twelve kinds of national coins which varied in value in the different sections of the country.

The seriousness of this struggle and the possibility of its ending in the overthrow of the constituted authorities, both state and confederate, were forcibly illustrated by Shays's rebellion in Massachusetts, which was an open defiance of the government of Massachusetts by several hundred men under the leadership of Daniel Shays, a former captain in Washington's army. This rebellion lasted six months (1786-87) during which the attitude of its participants toward the existing social and political order—an attitude more or less typical of the debtor-class of society throughout the country—was expressed in deliberative assemblies. "A levelling, licentious spirit, a restless desire for change, and a disposition to throw down the barriers of private rights," says Curtis, "at length broke forth in conventions, which first voted themselves to be the people and there declared their proceedings to be constitutional. At these assemblies the doctrine was publicly broached that property ought to be common, because all had aided in saving it from confiscation by the power of England. Taxes were voted to be unnecessary burdens, the courts of justice to be intolerable grievances, and the legal profession a nuisance. A revision of the (state) constitution was demanded, in order to abolish the Senate, reform the representation of the people, and make all the civil officers elective by the people. . . . Had the government of the state been in the hands of a person less firm and less careless of popularity that Bowdoin it would have been given up to anarchy and civil confusion." <sup>34</sup>

<sup>34</sup> George Ticknor Curtis, *Constitutional History of the United States* (1889), I, 181.

The commercial life of the country was as thoroughly chaotic as the monetary system. Great Britain took the West Indian trade away from the American merchants and also destroyed the "cod-fish aristocracy" of New England. The states waged a commercial war against one another by tariffs and discriminations of various kinds. "The different states, with their different tariff and tonnage acts," said John Fiske, "began to make commercial war upon one another. No sooner had the other three New England states virtually closed their ports to British shipping than Connecticut threw hers wide open, an act which she followed up by laying duties upon imports from Massachusetts. Pennsylvania discriminated against Delaware, and New Jersey, pillaged at once by both her greater neighbors, was compared to a cask tapped at both ends. The conduct of New York became especially selfish and blameworthy. . . . Of all the thirteen states, none behaved worse except Rhode Island." <sup>35</sup>

By 1785 it seemed that the entire economic and political order of the nation was threatened with dissolution. The establishment of a monarchy was freely discussed and European princes were solicited to become King. Foreign countries refused to make treaties with Congress on the grounds that they could not be enforced. The requisition system was not producing sufficient revenue to pay the interest on the national debt. Leading statesmen of the time were refusing to hold office in the Confederacy, preferring to participate in state politics. Pettifogging politicians were quarreling with one another in Congress and were absenting themselves to prevent the transaction of business. In 1786, a grand committee of Congress proposed to strengthen the Confederation by the addition of seven articles to the Constitution, but nothing was done with this report. "In fact," says McLaughlin, "that sober body of deputies was getting to be worse than helpless; a good part of the time it could not even pass resolutions; and it was largely made up of decidedly second-rate men, who could not see an inch into the future. The whole fabric of the Confederation was creaking in every joint." <sup>36</sup> What was to happen?

The failure to strengthen the central government by the method provided in the Articles of Confederation plus the discord caused by the disintegrating forces of society made it necessary to resort to extra-legal, if not revolutionary, means to accomplish this purpose. This situation seems to have been anticipated even before

<sup>35</sup> Fiske, *op. cit.*, 144 ff.

<sup>36</sup> A. C. McLaughlin, *The Confederation and the Constitution* (1905), 172.



the Articles of Confederation were in operation. As early as 1780 Alexander Hamilton urged the calling of a national convention to frame a new constitution. In 1787, Pelatiah Webster advocated the same, maintaining it was "ten times easier to form a new constitution than to mend the old one." In 1782, the New York assembly recommended a convention to increase the powers of the central government and in 1783 Washington, in a circular letter to the governors of the states, urged the establishment of a supreme power to regulate national affairs. In 1785 Governor Bowdoin of Massachusetts recommended to his legislature the advisability of calling a national convention to define the powers of Congress. Following this suggestion, the legislature passed a resolution, calling attention to the inefficiency of the Confederation and suggesting its reformation, but this resolution was not brought before Congress, and, therefore, did not provoke any immediate action. The radical legislation of the states was possibly the chief force in producing the Convention. Madison, in speaking of these laws, said: "The injustice of them has been so frequent and so flagrant as to alarm the most steadfast friends of Republicanism. I am persuaded I do not err in saying that evils issuing from these sources contributed more to that uneasiness which produced the Convention, and prepared the public mind for a general reform, than those which occurred to our national character and interest from the inadequacy of the Confederation to its immediate objects."

Fortunately for the country, after a half decade of agitation, a movement for the settlement of interstate matters initiated by Virginia and Maryland in 1785 ended in the calling of a national convention to consider the revision of the Articles of Confederation. In 1785, Virginia and Maryland sent delegates to Alexandria to consider the subject of the regulation of commerce upon the waters common to both states. These delegates recommended in addition to uniformity of commercial regulation a common currency. Realizing that such regulations even if adopted would have a very limited application unless they were accepted by neighboring states and that the matter of interstate commerce was national in character anyway, they recommended that a general convention be called to consider the problem of uniform commercial regulations. Accordingly, Virginia invited all the states to send delegates to a convention to be held at Annapolis for this purpose. In response to this invitation nine states elected delegates, but only five sent delegates—New York, New Jersey, Pennsylvania, Delaware, and Virginia. Twelve delegates representing these states met

at Annapolis in September, 1786, and began the consideration of the commercial relations of the states. It soon developed that this subject was so intimately related to other matters <sup>37</sup> that nothing short of a reconstruction of the political order of the country would apparently meet the requirements of the situation. A committee appointed by the convention reported "that the power of regulating trade is of such comprehensive extent and will enter so far into the general system of the federal government, that to give it efficacy, and to obviate questions or doubts concerning its precise nature and limits, may require a correspondent adjustment of other parts of the Federal System." <sup>38</sup> After due consideration the convention finally decided to recommend, in a report prepared by Alexander Hamilton, that a general convention be held the next year at Philadelphia "to devise such further provisions as shall appear to them necessary to render the constitution of the Federal Government adequate to the exigencies of the Union."

The recommendation of the Annapolis convention was sent to the legislatures or the executives of the thirteen states <sup>39</sup> and to Congress. After seven states had selected delegates to the convention, <sup>40</sup> Congress, without referring to the request of the Annapolis convention, on February 21, 1787, issued a call for a convention to meet in Philadelphia on the second Monday of May, 1787, "for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall when agreed to in Congress and confirmed by the states render the federal constitution adequate to the exigencies of Government and the preservation of the Union." <sup>41</sup>

After the issue of the call by Congress, five other states, New York, South Carolina, Massachusetts, Connecticut, and Maryland selected delegates to the convention; Rhode Island did not send representatives. The convention was, therefore, composed of representatives from only twelve states. The delegates were selected by the state legislatures or by governors under legislative direction and

<sup>37</sup> The instructions of the New Jersey delegates gave them power to consider in addition to commercial regulations "other important matters." This suggestion seemed to furnish the key to future action.

<sup>38</sup> *House Document No. 398*, 69th Congress, 1st Session, 42.

<sup>39</sup> The report of the Annapolis Convention was sent to the legislatures of the five states represented and to the governors of the other eight.

<sup>40</sup> These states were in the order of their action: New Jersey, Virginia, Pennsylvania, North Carolina, New Hampshire, Delaware, and Georgia. See footnote in *House Document No. 398*, 69th Congress, 1st Session, 55.

<sup>41</sup> *Journals of Congress*, February 21, 1787.

instructed to revise the Articles of Confederation,<sup>42</sup> presumably in harmony with the call of the convention. If it had been generally thought that the delegates would have violated their instructions and proposed a new political order, it is doubtful whether the states would have selected delegates to the convention. Apparently very few statesmen of the day believed that a convention would accomplish any constructive results.

<sup>42</sup> For the character of their instructions, see Hunt and Scott, *op. cit.*, LXXXVI-XCVII.

## CHAPTER V

### THE DRAFTING OF THE CONSTITUTION

#### I. THE PERSONNEL OF THE CONVENTION

The convention according to Madison<sup>1</sup> was composed of probably the most able men in the country. They were broadly trained by both study and experience; many were college graduates; four had studied law in the Temple in London. Sixty-two<sup>2</sup> delegates were elected; fifty-five attended the Convention; and thirty-nine signed the Constitution after it was written. Of the fifty-five who attended the Convention at some time or other, thirty-three were lawyers.<sup>3</sup> The average age of the delegates was about forty-two years; Franklin was the oldest, 81; and Dayton of New Jersey was the youngest, 27.

There were a few delegates of the highest order. Washington and Franklin were not pathfinders in the field of political science, but were influential members of the Convention because of their experience and prestige. James Madison was the scholar of the Convention and its most influential member. He was a graduate of Princeton, a former member of Congress, and a political philosopher of the first order. Before Karl Marx was born, he announced the economic basis of politics.<sup>4</sup> He clearly saw that the political order of a country was the mere formal side of the actual structure of its society. Alexander Hamilton, while not so scholarly and influential in the Convention as Madison, was probably its most brilliant member. He was an able lawyer, thoroughly conversant

<sup>1</sup> Madison, in a letter to William Short, June 6, 1787, twelve days after the Convention assembled, said: "It contains in several instances the most respectable characters in the U. S. and in general may be said to be the best contribution of talents the States could make for the occasion." Max Farrand, *The Records of the Federal Convention*, III, 36-37.

<sup>2</sup> This number is variously stated; sixty-five by Hunt and Scott, *Debates in the Federal Convention of 1787*, LXXXV; Farrand lists seventy-four, *op. cit.*, III, 557-559; still other authorities give seventy-three.

<sup>3</sup> The fifty-five delegates consisted of 33 lawyers, 8 business men, 6 planters, 1 teacher, 1 doctor, 1 minister, 3 politicians, and 2 others. See Charles Warren, *The Making of the Constitution* (1928), 55-95.

<sup>4</sup> *The Federalist*, No. 10.



with the defects of the Articles of Confederation, and had repeatedly urged their reform. Hamilton performed his greatest service to the nation in securing the ratification of the Constitution by New York State and, as a member of Washington's Cabinet, in devising plans for the practical working of the Constitution. James Wilson of Pennsylvania was undoubtedly the next most able member of the Convention. He was a very able lawyer, well versed in history and politics, experienced in business, and possessed of a high order of intellectual power. Oliver Ellsworth of Connecticut, King of Massachusetts, Mason of Virginia, Charles Pinckney of South Carolina, Gouverneur Morris of Pennsylvania, William Paterson of New Jersey, and John Dickinson of Delaware were able delegates and were active and influential in the Convention. There were relatively few delegates of a strictly mediocre character. In general the personnel of the Convention was representative of the professional and business classes of society. The disfranchised classes, including small farmers and tradesmen, the great masses, were not represented. Roger Sherman of Connecticut, a former shoemaker, and Robert Few of Georgia, the son of a farmer, both of whom had become rather prosperous, were the only members of the Convention who could in any sense be said to be representative of the lower classes of society. Forty of the fifty-five delegates were holders of depreciated securities of the old government and were in their advocacy of the establishment of a strong government representing the interests of the property-holding classes of the country.

The four leading radicals of the country, Patrick Henry, Thomas Jefferson, Samuel Adams, and Tom Paine did not attend the Convention. Patrick Henry was elected a delegate, but refused to attend, saying "he smelt a rat"; Jefferson was in France; Adams and Paine were not asked to attend. Probably there never was brought together at one place such a galaxy of intellectual men for political consideration. They were men of great vision and power, and drafted the most enduring instrument of government that has so far been devised.<sup>5</sup> They were practical statesmen, thoroughly familiar with the social order and cognizant of its proper relation to the political order.

<sup>5</sup> For splendid characterizations of the delegates, see Pierce's "Notes," 3 *Am. Hist. Rev.*, 325-334; A. C. McLaughlin, *The Confederation and the Constitution*, 184-190; John Fiske, *The Critical Period of American History*, 224-229; Robert Livingston Schuyler, *The Constitution of the United States* (1923), 73-84; Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* (1913), 73-151.

## II. THE SERIOUSNESS OF ITS PROBLEM

The Convention was composed of exceptionally able men as a whole among whom were a few Napoleonic minds, who realized the seriousness of the task that they were undertaking. This idea was forcibly expressed by George Mason, a delegate from Virginia, in a letter to his son: "The revolt from Great Britain and the formation of our new governments at that time, were nothing compared to the great business now before us; there was then a certain degree of enthusiasm, which inspired and supported the mind; but to view, through the calm, sedate medium of the reason the influence which the establishment now proposed may have upon the happiness or misery of millions yet unborn, is an object of such magnitude, as absorbs, and in a manner suspends the operations of the human understanding." <sup>6</sup> James Wilson, the most able delegate from Pennsylvania, stated the case during the Convention as follows: "When I considered the amazing extent of the country, the immense population which is to fill it, the influence which the government we are to form will have, not only on the present generation of our people and their multiplied posterity, but on the whole globe, I was lost in the magnitude of the object." <sup>7</sup> Madison and Hamilton asserted that they "were now to decide forever the fate of Republican Government."

## III. ORGANIZATION AND PROCEDURE

The Convention was called to meet May 14, 1787, but it was the 25th before a quorum was present. The Convention organized by electing George Washington of Virginia, chairman; William Jackson, secretary; Nicholas Weaver, messenger; and Joseph Fry, door-keeper. The Convention, having full power to adopt its own rules of procedure, decided to work behind closed doors, to give no publicity to its proceedings, and to allow each state one vote as had been the practice of Congress under the Articles of Confederation, seven states constituting a quorum, and a majority being competent to decide all questions.

## IV. THE CHARACTER OF THE CREDENTIALS OF ITS MEMBERS

The examination of the credentials of the delegates was necessary not merely to see that they were the legal representatives of

<sup>6</sup> Farrand, *op. cit.*, III, 36-37.

<sup>7</sup> Hunt and Scott, *op. cit.*, 162-163.

the states, but also to decide what authority they had. The credentials contained the delegation of authority which the states had given them. In general, their instructions were in harmony with the call of the convention issued by Congress; namely, that they were to revise the Articles of Confederation. The delegates of Delaware were specifically forbidden to change the principle of equality of voting of the states which was a feature of the Confederacy.

## V. THE PLANS PROPOSED FOR THE NEW GOVERNMENT

The Convention really began its work May 29, on which day Randolph of Virginia introduced the Virginia Plan, known as the Randolph Resolutions, the chief provisions of which were:

1. The Articles of Confederation should be enlarged to accomplish the objects of "common defense, security of liberty and general welfare."

2. The right of suffrage in the national legislature should be proportional to the contributions of the various states or their free inhabitants.

3. The national Legislature should consist of two houses.

4. The members of the first branch should be elected by the people of the various states and those of the second branch should be elected by the first from persons nominated by the legislatures of the states.

5. The powers of the National Legislature should be adequate for all purposes for which the states were incompetent, including the power to negative all laws passed by the states contravening in its opinion the Articles of Union and to use the military forces of the Union against any state failing to fulfill its constitutional obligations.

6. A National Executive should be instituted to be chosen by the National Legislature.

7. A Council of Revision, composed of the National Executive and a convenient number of the National Judiciary, should be established with the power to review the acts of the National Legislature and the state legislatures before they become operative. The rejection of such acts by the Council should amount to a veto which might be overridden by the particular legislative body concerned.

8. A National Judiciary, consisting of one or more supreme tribunals and inferior tribunals whose judges should be chosen by the National Legislature and hold office during good behavior, should be established.

9. New states might be admitted by the National Legislature.

10. A Republican form of government should be guaranteed to each state by the United States.

II. The members of the state legislatures, the state judiciaries, and the state executives should be bound by oath to support the Articles of Union.<sup>8</sup>

On the same day, Charles Pinckney, a delegate from South Carolina, proposed a plan for the new government, which seems to have had more influence in finally shaping the Constitution than has generally been recognized.<sup>9</sup> In view of this fact, it seems worth while to present a few of the important provisions of the Pinckney Plan:

1. A Congress consisting of two branches, a Senate and a House of Delegates; Senators to be elected by the House of Delegates either from among themselves or from the people, and the House of Delegates to be chosen by the people.

2. A President to be chosen every seven years by the Senate and the House of Delegates by joint ballot from among themselves or the people.

3. A Council consisting of heads of departments with whom the President could advise.

4. A Council of Revision consisting of the President and any two of the heads of departments.

5. A Federal Court of Appeals to be established by Congress, which could also establish courts of admiralty in each state; the judges in these courts to be appointed by Congress for life.

6. The acts of state legislatures to become law only with the approval of Congress.<sup>10</sup>

Both of these plans<sup>11</sup> were to be considered the next day in the Committee of the Whole, but instead Randolph proposed that the consideration of his plan introduced the previous day be postponed for the consideration of the proposition "that a *national*

<sup>8</sup> Farrand, *op. cit.*, I, 27-28; see also Hunt and Scott, *op. cit.*, 23-26; and Warren, *op. cit.*, 134-172.

<sup>9</sup> The reason that the Pinckney Proposal has not received the attention it deserves is that it was lost while in the hands of the Committee of Detail. It has been reconstructed from James Wilson's papers by Professors Jameson and McLaughlin; the latter says that "we say that Pinckney suggested some thirty-one or thirty-two provisions which were finally embodied in the Constitution; of these, about twelve were originally in the Articles of Confederation." 9 *Am. Hist. Rev.*, 741.

<sup>10</sup> The reconstructed Pinckney Plan may be found in Hunt and Scott, *op. cit.*, 596-598.

<sup>11</sup> The Pinckney Plan was never considered by the convention or the Committee of the Whole, but was used by the Committee of Detail of which James Wilson was a member. It was by this means and Pinckney's efforts in the convention that his proposal was a factor in the making of the Constitution.



government ought to be established consisting of a *supreme* legislative, executive, and judiciary.”<sup>12</sup> The motion to postpone was unanimously adopted by the Committee of the Whole, and it began the consideration of Randolph’s last proposal that a *national* government be established. In the course of debate Gouverneur Morris explained “the distinction between a *federal* and a *national supreme* government: the former being a mere compact resting on the good faith of the parties; the latter having a complete and compulsive operation.”<sup>13</sup> He further added “that in all communities there must be *one supreme power*, and only one.” The Committee of the Whole voted six to one, New York divided, in favor of this resolution. Madison on the same day, in discussing the subject of representation, said “whatever reason might have existed for the equality of suffrage when the Union was a *federal* one among sovereign states, it must cease when a *national* government should be put in the place.”<sup>14</sup>

It thus happened within five days of the organization of the Convention, that it committed itself to the principle of establishing a national government which would derive its powers from the people and operate directly upon them. This was a step toward the solution of the problem of coercion which exists in all federal governments; that is, the problem of compelling the political units of a composite state—whether states, cantons, or provinces—to comply with their federal obligations. This was the problem of the Critical Period. The above decision from which the Convention never departed pointed toward the solution of this problem by the establishment of a series of governmental agents—the national agent and state agents—assigning to each separate powers to be exercised directly on the same individuals without any intervention. In effect, this meant the establishment of two governments to operate in the same territory and over the same persons, but with different jurisdictions. Madison pointed out that under the Articles of Confederation the acts of Congress depended “for their efficacy on the cooperation of the states,” but that under the system just adopted “the acts of the general government would take effect without the intervention of the state legislatures.” Later, June 20th, on motion of Ellsworth of Connecticut, the word “national” was dropped by common consent and the phrase “government of the United States” was substituted for it under the apprehension that

<sup>12</sup> Farrand, *op. cit.*, I, 33.

<sup>13</sup> *Ibid.*, I, 34.

<sup>14</sup> *Ibid.*, I, 37.

its retention might endanger the ratification of the Constitution. However, this meant no change in the proposed system.

After the Committee of the Whole had agreed to the establishment of a national government, it proceeded to a further consideration of the features of the Randolph Resolutions. It was decided that Congress should consist of two houses and that membership in each house should be based on population.<sup>15</sup> It seemed for the time being, that the Randolph Resolutions, or the proposal of the big states, that is, those with the largest populations, would be adopted, certainly in its general principles. Just as the Committee of the Whole was ready to report to the Convention on the big state plan, the little states, which had been gradually organized with a view of presenting a federal plan for the Union, came forward with their proposal, which was introduced by Paterson of New Jersey, June 15, and which is known as the Paterson or New Jersey Proposal.

The chief features of this plan are:

1. The revision of the Articles of Confederation and hence the adoption of a federal rather than a national government.
2. Congress to consist of one house composed of representatives of the states, but to have enlarged powers, including the control of import duties, stamp taxes, postal charges, trade, and commerce.
3. The acts of Congress and treaties to be the supreme law of the land, the acts of the state legislatures to the contrary notwithstanding.
4. The Union to have the power of coercion over both individuals and states by the use of military force if necessary.
5. A federal executive composed of a number of individuals elected by Congress and not possessed of the veto power.
6. A Supreme Court whose judges were to be appointed by the Executive and to hold office during good behavior.
7. Provision for the admission of new states into the Union, the enactment of uniform laws of naturalization, and the extradition of criminals.<sup>16</sup>

While the relative merits of the Randolph and Paterson plans were being debated by the Committee of the Whole, Alexander Hamilton of New York, on June 18, introduced a fourth proposal for the new system, the main provisions of which are:

1. Legislature of the United States to consist of two houses to be styled the Assembly and the Senate.

<sup>15</sup> *Ibid.*, I, 15-239.

<sup>16</sup> *Ibid.*, I, 242-245.

2. The Assembly to be composed of representatives elected by a universal manhood suffrage.

3. The Senate to be chosen for life by electors selected by the voters from districts into which the states would be divided; a land qualification to be required of the electors.

4. The executive authority to be vested in a Governor elected for life by electors chosen by the voters<sup>17</sup> from the senatorial election districts, and to have the veto on all laws passed by the National Legislature.

5. Judicial authority to be exercised by a Supreme Court whose judges were to hold office for life.

6. The governors of the states to be appointed by the general government and to have a negative upon the acts of state legislatures.

7. The laws of the states contrary to the constitution or the laws of the United States to be utterly void.

8. No state to have any land or naval forces; the state militia to be under the exclusive direction of the United States.<sup>18</sup>

There were now four proposals before the Convention—one federal and three national; however, only two of these, the Randolph and Paterson Plans, were considered by the Convention as such. The Pinckney Proposal was used by the committee of detail; yet it is difficult to say to what extent. Hamilton's plan was never considered by the Convention or any of its committees, yet several members made copies of it, and, doubtless, were influenced by it. Hamilton made a very able speech in presenting his plan. "The aim of his great speech and of his draft of a constitution", it has been said, "was to brace the minds of his fellow members and to stimulate them to taking higher ground than the majority of their constituents demanded. In this he succeeded. His eloquent reasoning, if it did not lead men to his own conclusions, at least, raised their tone, enlightened many members, and brought them to a more advanced ground than they were at first prepared to take."<sup>19</sup>

## VI. THE BASIS OF THE WORK OF THE CONVENTION

The documents that were most useful to the Convention in drafting the Constitution were the plans of Randolph, Paterson, and Pinckney, the Articles of Confederation, and the state consti-

<sup>17</sup> Some texts of Hamilton's proposal provide a still more indirect method for the selection of the Governor. See *Documents Illustrative of the Formation of the Union of American States* (1927), 981, 983, 987.

<sup>18</sup> Farrand, *op. cit.*, I, 291-293; III, 617-630.

<sup>19</sup> Henry Cabot Lodge, *Alexander Hamilton* (1898), 61-62.

tutions, especially the New York constitution of 1777 which was of especial service in connection with provisions concerning the executive.<sup>20</sup> While the Convention on June 19 voted seven to three with Maryland divided in favor of the Randolph Plan in preference to the Paterson Plan, the Constitution as finally drafted contained principles from each. It seems, however, that the Articles of Confederation was used more extensively than any other document. "The truth is," said Madison, "that the great principles of the Constitution proposed by the Convention may be considered less as absolutely new, than as the expansion of principles which are found in the Articles of Confederation,"<sup>21</sup> and he further said, "If the New Constitution be examined with accuracy and candor, it will be found that the change which it proposes consists much less in the addition of *New Powers* to the Union, than in the invigoration of its *Original Powers*."<sup>22</sup>

Of course, documents alone did not constitute the whole of the source material used in drafting the Constitution. Experiences of the members of the Convention had been such as to make them practical men of affairs. They knew from experience the defects in other systems and were thus able to avoid the incorporation of their imperfections into our own. The records of the Convention indubitably show that several of its members had carefully studied the experiments of the Greeks in federalism as well as the federal systems of Switzerland, Germany, and the Netherlands. The Common Law was an influential factor because so many members of the Convention were lawyers. Political theory, particularly the writings of Locke and Montesquieu, colored the ideas of the framers. Locke was the political philosopher of the resolution of 1689 in England and the expounder of natural law which the forefathers made the basis of the Declaration of Independence and from which they derived the principle of a limited government. The principles of the English Constitution were constantly discussed in the Convention and on this subject Montesquieu was regarded as the outstanding authority.

Finally, it is reasonable to suppose that the calibre of mind possessed by the large majority of the Convention was not a slave to any particular theory or system. The Convention was face to face with a set of economic and political problems peculiar to

<sup>20</sup> Max Farrand, *The Framing of the Constitution of the United States* (1913), 124-133.

<sup>21</sup> *The Federalist*, No. XL, 244 (Lodge Ed.).

<sup>22</sup> *Ibid.*, No. XLV, 291 (Lodge Ed.).



America on which previous theories of the state and constitutional systems could give only general suggestions. There remained the application of general principles to specific problems. Fortunately for America and mankind, the framers of the Constitution were sufficiently schooled in the practical affairs of public life of both an economic and political nature to keep their feet on the ground while they worked out the constitutional order for one of the most remarkable political systems which has ever been established. Time has already placed this evaluation upon their work.

## VII. SOME MAJOR PROBLEMS OF THE CONVENTION AND THEIR SOLUTIONS

1. *Coercion*. Undoubtedly the problem of coercion constituted the crux of the Convention's difficulties because the successful working of any federal system of government depends on a proper solution of this problem. Was the government to be national or federal or partly national and federal? What were to be the relations between the national government and the state governments, or were they to have no relations, each having certain relations with individuals in entirely different capacities, or were they to have a combination of relations with each other and with individuals?

It has already been noted that the Convention on June 19 decided that a national government should be established, and it was explained at that time that this meant that the general government would not be the agent of the states, acting for and through them, but that a dual system of government would result, a national agent acting directly upon individuals in the same way as the state governments would operate. In discussing this matter, Mason pointed out that punishment could not be executed upon states collectively, "and therefore that such a government was necessary as could directly operate on individuals."<sup>23</sup>

While the adoption of this principle as the basis for the general government was a complete departure from previous federal systems, and possibly the most important decision that the convention made, it did not completely solve the problem of coercion. Granting that the powers of government were to be divided between a national agent and several state agents, and that these powers were to be exercised directly upon individuals, how could conflicts be

<sup>23</sup> Farrand, *The Records of the Federal Convention*, I, 34.

prevented in the exercise of these powers, and, in case of conflicts, how could they be decided without the use of force?

It was proposed to give Congress a veto over the acts of the state legislatures as a means of preventing the state governments from encroaching upon the powers of the general government. While the congressional veto was being discussed, Luther Martin, on July 17th, proposed that the acts of Congress passed in pursuance of the Constitution and all treaties made under the authority of the United States be "the supreme law of the respective states" and that their judiciaries "be bound thereby in their decisions, anything in their respective laws of the individual states to the contrary notwithstanding."<sup>24</sup> From this suggestion was developed the supreme-law-of-the-land clause of the Constitution which establishes national supremacy and which is embodied in Article VI of the Constitution, known as the 'King Pin'<sup>25</sup> of the Constitution.<sup>26</sup> This clause in its finished form reads: "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding."

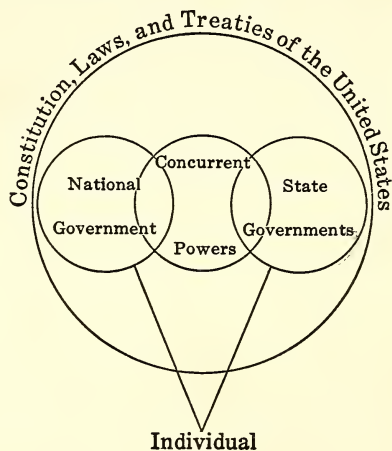
This clause of the Constitution subjects the acts of the state legislatures and of Congress to judicial review. If the state governments or the government of the United States undertake by legislation or executive action to exercise a power not reserved or granted in the Constitution, the courts will nullify such acts. The state judges are sworn to support the supreme law of the land anything in the constitution or laws of their respective states to the contrary notwithstanding. If a state court holds contrary to the supreme law of the land, its decision is subject to review by the Supreme Court of the United States, and, thus, national supremacy is established. An act of Congress to be a part of the Supreme Law

<sup>24</sup> *Ibid.*, II, 28-29.

<sup>25</sup> It is called the 'King Pin' because it holds our system of government together and makes it work. It took its name from the King Pin that holds the fore wheels and hind wheels of a wagon together.

<sup>26</sup> This idea had been suggested in the New Jersey proposal but not in this connection. The New Jersey proposal as well as the Virginia proposal suggested the use of force as the means of coercing a state. The Virginia plan suggested also the Congressional veto. It was finally decided that the use of force would possibly involve a war upon the states by the Union and that the Congressional veto was at best impracticable. It would employ Congress most of its time to pass on the acts of state legislatures.

of the Land must be "in pursuance of the Constitution." The Supreme Court of the United States is the final judge in this matter. So it happened that instead of using the army and the navy upon states or the congressional veto on the acts of state legislatures, the courts in the quiet and deliberate atmosphere of the court room, after careful debate and analysis, were constituted the coercive agents of our system of government. This is the most unique feature of our government and made the framers of the Constitution pathfinders in the field of practical politics. The solution of this problem might be diagrammed as follows:



*Steps:*

1. Separation of powers of National Government and State Governments.
2. Operation of both National and State Governments directly on the Individual.
3. Constitution, Laws, and Treaties of the United States to be the Supreme Law of the Land.

It is incorrect to maintain, as is frequently asserted, that the national government does not operate upon the states. "It is a mistake," said Justice Story, "that the constitution was not designed to operate upon states, in their corporate capacities."<sup>27</sup> In the tenth section of the first article there is a list of prohibitions upon the states from some of which Congress can free state authorities. In other instances the Constitution commands the states to perform

<sup>27</sup> *Martin v. Hunter's Lessee* (1816), 1 Wheaton 304.

certain duties; such as providing for the elections of representatives, senators, and electors of the President and Vice-President. The courts of the United States can review the proceedings of the executive, legislative, and judicial authorities of the states, and, if they are found to be contrary to the Constitution, may declare them invalid.

2. *Representation.* The Virginia or big state plan proposed that representation in both branches of the national legislature be based on population, while the New Jersey or little state plan proposed a single house legislature based on equal suffrage for the states. The question was whether representation should be national or federal, ostensibly; but, really, it was a question of who was to control the general government. If representation was based on population, the most populous states, of course, would have the balance of power; if, however, the states possessed equal voting strength in a unicameral legislature, a little state would be as powerful as a big one. The latter principle had been followed under the Articles of Confederation, but since it had already been decided that a national government was to be established, the former principle was the logical one to follow and apparently was already adopted by implication.

It has just been noticed that the general government operates on both individuals and states; that is, in this respect it is both national and federal. Why could not representation be based on both population and states, and, hence, be both national and federal? On June 21, Dr. Johnson, a delegate from Connecticut, suggested that the states be represented in the second branch of the national legislature,<sup>28</sup> and on June 29, after the matter of representation had been debated for several days, he further elaborated his suggestion, stating that "the controversy must be endless whilst Gentlemen differ in the grounds of their arguments: those on one side considering the states as districts of people composing one political society; those on the other considering them as so many political societies. The fact is that the states do exist as political societies, and a Govt. is to be formed for them in their political capacity, as well as for the individuals composing them. Does it not seem to follow, that if the states as such are to exist they must be armed with some power of self-defense. . . . On the whole he thought that as in some respects the states are to be considered in their political capacity, and in others as districts of individual citizens. the two ideas embraced on different sides, instead of being opposed

<sup>28</sup> Farrand, *The Records of the Federal Convention*, I, 363.



to each other, ought to be combined; that in *one* branch the *people*, ought to be represented; in the *other*, the States.”<sup>29</sup> On the same day, Ellsworth of Connecticut observed that “we were partly *national*; partly *federal*. The proportional representation in the first branch was conformable to the national principle and would secure the large states against the small. An equality of voices was conformable to the federal principle and was necessary to secure the small states against the large. He trusted that on this ground a compromise would take place.”<sup>30</sup> Accordingly, he made a motion “*that in the second branch each state have an equal vote*”, stating that his object was “to make the general government *partly federal and partly national*.”<sup>31</sup> On July 2, this motion resulted in a tie vote, and the Convention, observed Roger Sherman of Connecticut, was “now at a full stop.”<sup>32</sup> Luther Martin of Maryland said, “You must give each state an equal suffrage, or our business is at an end.”<sup>33</sup> On a motion of General Pinckney of South Carolina, a committee composed of a representative from each state was elected to consider the matter of representation in each branch of the national legislature and to report its findings to the Convention. It happened that not a single aggressive nationalist was placed on this committee, while the small states were represented by their most able champions.<sup>34</sup>

As might easily have been conjectured from the personnel of the committee, its report was to give equal representation of the states in the second branch to offset proportionate representation of the people in the first branch, with the unimportant concession to the big states that the first branch should have the sole power of originating money bills. Madison and Wilson vigorously opposed this compromise, but on July 16 the report of the committee was adopted by a vote of five to four.

3. *The Executive*. The experience of the forefathers under the Articles of Confederation convinced them of the necessity of a distinct executive, but they still differed very widely as to its form

<sup>29</sup> *Ibid.*, I, 461-462.

<sup>30</sup> *Ibid.*, I, 468.

<sup>31</sup> *Ibid.*, I, 474.

<sup>32</sup> *Ibid.*, I, 511.

<sup>33</sup> *Ibid.*, I, 517.

<sup>34</sup> The committee consisted of Mason of Virginia (not Madison), Yates of New York (not Hamilton), Franklin of Pennsylvania (not Wilson), Gerry of Massachusetts (not King), Rutledge of South Carolina (not Pinckney), Paterson of New Jersey, Ellsworth of Connecticut, Bedford of Delaware, Martin of Maryland, Davie of North Carolina, and Baldwin of Georgia. See, *Ibid.*, I, 520.

and powers. Many of the delegates of the Convention believed the people to be opposed to even "the semblance of monarchy", and, therefore, advocated a plural executive composed of a representative from each of two or more divisions of the Union.

All of the proposals for the new Constitution recommended the establishment of an executive: the Virginia plan refrained from saying whether single or plural; the New Jersey plan suggested a plural executive; Pinckney and Hamilton proposed a single executive, called "the President" by Pinckney and the "Governor" by Hamilton.<sup>35</sup> On June 4 the Committee of the Whole voted seven to three in favor of a single executive to be elected by Congress for a term of seven years, to be ineligible for a second term, and to exercise a qualified veto over the acts of Congress.<sup>36</sup> The fact that all the states had single executives largely influenced the Convention in favor of the above decision.<sup>37</sup>

In addition to the form of the executive, there were the matters of term of office, method of election, powers, and impeachment, all of which were of a controversial nature and settled only, after prolonged debate, by compromise. It was finally decided that the President should be elected indirectly for a term of four years, should be indefinitely reëligible to election, should have ample powers, and be subject to impeachment by the House of Representatives and trial by the Senate.<sup>38</sup>

4. *Economic Provisions.* We have Madison's statement that it was the injurious effects to economic interests, resulting from the defects of the Articles of Confederation, that caused the calling of the Federal Convention. "The movement for the Constitution of the United States," says another eminent authority, "was originated and carried through principally by four groups of personalty interests which had been adversely affected under the Articles of Confederation: money, public securities, manufactures, and trade shipping."<sup>39</sup> "No one," says a third authority, "can read much of the correspondence or pamphlet literature of the day without perceiving that powerful economic factors underlay

<sup>35</sup> For these proposals see *Ibid.*, I, 21, 28, and III, 599; and Warren, *op. cit.*, 174-219.

<sup>36</sup> *Ibid.*, I, 97.

<sup>37</sup> "Mr. Wilson said that all the Constitutions of America from New Hampshire to Georgia have their Executive in a single person. A single person will produce vigor and activity. Suppose the Executive to be in the hands of a number they will probably be divided in opinion." *Ibid.*, I, 109.

<sup>38</sup> Some of these matters are more fully discussed under the President.

<sup>39</sup> Beard, *op. cit.*, 324.

the movement which resulted in the framing and adoption of the Constitution. Indeed these appear to have been the dynamic forces at work." <sup>40</sup>

Undoubtedly, therefore, one of the most serious phases of the work of the Convention was to heal the economic wounds of the property-holders of the nation. "The antagonism of rich and poor, creditor and debtor, merchant and small farmer, which was a commonplace of contemporary discussion, was a fact so portentous as to arouse in the minds of intelligent observers the most serious apprehensions for the stability of American institutions and the future of American society." <sup>40</sup>

The gravity of this situation does not mean that it was a contentious matter before the Convention, because there was not a man in that assembly who was not more or less personally interested in property rights, thoroughly conversant with the economic turmoil of the country, and appreciative of the importance of the economic welfare. Of course, it should be remarked that property was more widely and more evenly distributed in 1787 than at the present time. The interest here involved was not peculiar to any class.

That the matters of commerce, government securities, contractual rights, bankruptcy, sound money, and financial matters in general were handsomely cared for is evidenced by many of the clauses of the Constitution. Congress was given the power to raise revenue by taxation, to borrow money on the credit of the United States, and to regulate foreign and interstate commerce. An interesting provision of the Constitution is that "all debts contracted and engagements entered into before the adoption of the Constitution shall be as valid against the United States under this Constitution, as under the Confederation." It was also provided that no state was to issue bills of credit or impair the obligation of contract. Here the issue of paper money by the states and their interference with the contract rights of property—two of the abuses of the decade prior to 1787—were definitely prohibited.

5. *Treaty-making.* One of the most frequently debated subjects that came before the Convention and that was not settled until just a fortnight before its adjournment was the matter of making treaties. Who should make them—President, or Senate, President and Senate, or President, Senate, and House of Representatives? Should the ratification of treaties by the Senate be by a simple majority, two-thirds majority, or three-fourths majority, or vary

<sup>40</sup> Schuyler, *op. cit.*, 110.

according to the nature of the treaty? What should be the scope of the treaty-making power? Could the House of Representatives be forced to make an appropriation to satisfy a provision of a treaty? Was a treaty to be a part of the supreme law of the land? It was finally decided to give the treaty-making power to the President and two-thirds of the Senate and to make treaties a part of the supreme law of the land. This solution has proved very unsatisfactory in its practical workings and there is considerable agitation for a change.

6. *The Judiciary.* One of the defects of the Confederacy that called for correction was its lack of a system of courts. All of the proposals for the new Constitution advised the establishment of a set of national courts. There were two possibilities in this matter: (1) a supreme court exercising appellate jurisdiction over state courts, thus making state courts agents of national administration in judicial matters and practically pockets of the supreme court; or (2) a set of national courts consisting of a supreme court and inferior courts. Here again the problem was one of nationalism *versus* federalism. Rutledge of South Carolina, speaking for the federalists, contended "that the State Tribunals might and ought to be left in all cases to decide in the first instance the right of appeal to the supreme national tribunal being sufficient to secure the national rights and uniformity of judgments; that it was making an unnecessary encroachment on the jurisdiction [of the States] and creating unnecessary obstacles to the adoption of the new system."<sup>41</sup> Madison, however, maintained "that unless inferior tribunals were dispersed throughout the Republic with *final* jurisdiction in *many* cases, appeals would be multiplied to a most oppressive degree; that besides, an appeal would not in many cases be a remedy. What was to be done after improper verdicts in state tribunals obtained under the biased directions of a dependent judge, or the local prejudices of an undirected jury? To remand the cause for a new trial would answer no purpose. To order a new trial at the supreme bar would oblige the parties to bring up their witnesses, tho' ever so distant from the seat of the court. An effective Judiciary establishment commensurate to the legislative authority, was essential. A government without a proper Executive and Judiciary would be the mere trunk of a body without arms or legs to act or move."<sup>41</sup> It was voted five to four, the delegations of two states being divided, in the Committee of the Whole June 5 not to establish inferior national courts. Madison and Wilson were

<sup>41</sup> Farrand, *The Records of the Federal Convention*, I, 124.



finally able to secure a provision in the Constitution, giving Congress the discretionary authority to establish inferior national courts. This provision as a compromise was adopted by a vote of eight to two, one delegation being divided.<sup>42</sup> The matters of salary for judges, method of appointment, tenure of office, and jurisdiction of the national courts were all controversial matters that are more extensively discussed in connection with the judiciary. It was finally agreed that there should be established one supreme court and such inferior courts as Congress might see fit to establish, that the judges of these courts should be appointed by the President and Senate to serve during good behavior, and that their salaries should not be diminished during their continuance in office.

7. *Division of Powers.* In dividing the powers of government between a national government and the state governments, the Convention was confronted with possibly the most difficult matter that came before it, because it involved a careful analysis of the actual structure of American society at the time and a foresight into the future order that this society would most likely assume. This problem was all the more serious because whatever division of powers it was thought wise to make was to be stated in the Constitution, which, as a fundamental law, would be difficult to change. On this matter, therefore, there was ample opportunity offered to make a serious blunder that might plague the nation for some time.

The problem was—what matters were essentially national in character; that is, what concerned the American people as a whole, and, therefore, should be placed under the jurisdiction of the national government; and what matters were peculiarly local in character, and therefore should be left in the hands of the states, or in those of the people, to be given to state governments, or reserved to themselves? What powers did the American people in their national character want to grant to the general government and what powers did they want to reserve to themselves in their local capacities to be granted to state governments in such manner and to such a degree as they in their several capacities saw fit? The American people, in other words, were to be one people in some respects and several peoples in other respects. In so far as they were one, they could act only through a general government; in so far as they were several, they could act only through several governments. Uniformity of action would prevail in the first instance, but diversity of action might prevail in the second; for in

<sup>42</sup> *Ibid.*, I, 125.

their several capacities, they were already separated by state lines and were living under state governments. The state lines were allowed to stand as the means of districting the people for the purposes of local government, but the existing state governments were treated as if they did not exist; that is, the division of powers that was made took no cognizance of the existing political order.

This problem fortunately had been in the process of solution since the establishment of the colonial governments by charters from the Crown. Throughout the colonial period there was constant debate over what was imperial and what was colonial in character, and a line of division was constantly being established. When the Articles of Confederation were established, this line was actually drawn; imperial had given way to national, and colonial to state. In other words the Americans took nearly two hundred years to make the division of powers that finally appeared in the Constitution.

It was not difficult to decide that the army, the navy, war, peace, foreign affairs, treaty-making, Indian affairs, and the admission of new states into the Union should be considered national affairs, but how about commerce, taxation, proceedings in bankruptcy, currency, weights and measures, duties, education, roads, police power, health, agriculture, manufacturing, business matters, civil and criminal law? Congress was given the power to regulate foreign commerce, interstate commerce, and commerce with the Indians, to coin and borrow money, to control proceedings in bankruptcy, and levy import duties. Education, police, agriculture, health, morals, general business affairs, manufacturing, civil and criminal law were regarded as matters for the people to handle in their state capacities.

8. *Amendment.* It has been pointed out that the Articles of Confederation failed largely because it required the consent of all the states to make an amendment. Was the Convention to profit from this experience? It was thought by some of its members that the new instrument would not be subject to amendment and by others that Congress should not be permitted to propose amendments. Mason of Virginia maintained that "The plan now to be formed will certainly be defective, as the Confederation has been found on trial to be. Amendments therefore will be necessary, and it will be better to provide for them, in an easy, regular and constitutional way than to trust to chance and violence. It would be improper to require the consent of the Natl. Legislature, because they may abuse their power, and refuse their consent on that very

account.”<sup>43</sup> When the Committee of Detail made its report on August 6, the process of amendment was provided in Article XIX, reading as follows: “On the application of the Legislatures of two-thirds of the states in the Union, for an amendment of this Constitution, the Legislature of the United States shall call a convention for that purpose.”<sup>44</sup> Gerry of Massachusetts moved to reconsider Article XIX, stating that under this article “two thirds of the states may obtain a convention, a majority of which can bind the Union to innovations that may subvert the state constitutions altogether.” Hamilton seconded the motion, stating that he did not share the apprehension of Mr. Gerry, but that “the mode proposed was inadequate, the state legislatures will not apply for alterations but with a view to increase their own powers. The National Legislature will be the first to perceive and will be most sensible to the necessity of amendments, and ought also be empowered, whenever two thirds of each branch should concur, to call a convention.”<sup>45</sup> The motion was adopted by a vote of nine to one, New Hampshire divided. During the process of reconsideration Madison, seconded by Hamilton, moved that “The Legislature of the U. S.—whenever two thirds of both Houses shall deem necessary, or on the application of two thirds of the legislatures of the several states, shall propose amendments to this Constitution, which shall be valid to all intents and purposes, as part thereof, when the same shall have been ratified by three fourths at least of the legislatures of the several states, or by conventions in three fourths thereof, as one or the other mode of ratification may be proposed by the Legislature of the U. S.”<sup>46</sup> Rutledge of South Carolina objected to giving power to those states not interested in slavery to alter the articles in the Constitution relating to it. To meet this objection the motion was modified so that no change in these articles should be made prior to 1808. In this form it passed by a vote of nine to one, New Hampshire divided. On September 15, two days before the Convention adjourned, Sherman of Connecticut expressed the apprehension that three fourths of the states might amend the Constitution to the detriment of particular states, even abolishing them or depriving them of their equality in the Senate. After considerable crossfiring, Gouverneur Morris moved “that no State, without its consent shall be deprived of its equal

<sup>43</sup> *Ibid.*, I, 202-208.

<sup>44</sup> *Ibid.*, II, 188.

<sup>45</sup> *Ibid.*, II, 557-558.

<sup>46</sup> *Ibid.*, II, 559.

suffrage in the Senate.”<sup>47</sup> This proviso was accepted unanimously.

9. *Method of Ratification.* One of the most difficult questions for the convention to decide was what process was to be followed to make the Constitution the supreme law of the land. Should Congress be asked to approve it and then the state legislatures, if Congress acted favorably? If the legislatures were used, should the consent of two-thirds, three-fourths, or all be required? Or should Congress and the legislatures be ignored and state conventions be used, and; if so, was unanimity or a certain majority to be required? Also, and not the least significant, who had the authority to decide any of these questions? Or why raise such questions since as a matter of fact the Articles of Confederation—the constitution of the country at the time—said that all amendments were to be proposed by Congress and ratified by the legislatures of all the states?

The Convention decided that the political order then subsisting under the Articles of Confederation, including Congress and the state legislatures, did not have the authority to consent to the Constitution, and that it would be embarrassing to the members of these bodies to ask them to ratify the Constitution because all of them had taken an oath to support their respective constitutions. Gouverneur Morris said it was erroneous to suppose “that we are proceeding on the basis of the Confederation. This Convention is unknown to the Confederation.”<sup>48</sup> Madison thought it clear that the legislatures were incompetent to the proposed changes. These changes would make essential inroads on the state constitutions, and it would be a novel and dangerous doctrine that a legislature could change the constitution under which it held its existence. “He considered the difference between a system founded on the Legislatures only, and one founded on the people, to be the true difference between a *league* or *treaty*, and a *constitution*. The former in point of *moral obligation* might be as inviolable as the latter. In point of *political operation*, there were two important distinctions in favor of the latter. (1) A law violating a treaty ratified by a preëxisting law, might be respected by the judges as a law, though an unwise or perfidious one. A law violating a constitution established by the people themselves, would be considered by the judges as null and void. (2) The doctrine laid down by the law of nations in the case of treaties is that a breach of any one article by any of the parties, frees the other parties from their engage-

<sup>47</sup> *Ibid.*, II, 631.

<sup>48</sup> *Ibid.*, II, 92.



ments. In the case of a union of people under one constitution, the nature of the pact has always been understood to exclude such an interpretation. Comparing the two modes in point of expediency he thought all the considerations which recommended this Convention in preference to Congress for proposing the reform were in favor of state conventions in preference to the legislatures for examining and adopting it."<sup>49</sup> On July 23, it was decided by a vote of nine to one to refer the Constitution to conventions in the states chosen by the people for ratification. It was later decided not to ask Congress for its approval, but merely to request that it send the document to the legislatures of the states, asking that they call an election of delegates to state conventions to ratify or reject the Constitution, and to take steps to put the Constitution into operation as soon as nine conventions had acted favorably.<sup>50</sup>

The list of problems here presented makes no pretensions to completeness, but it is intended to give the atmosphere and the method used by the Convention in solving the many and intricate problems that came before it, all of which were controversial and settled only after prolonged debate and compromise. The more or less traditional ideas that there were only three great compromises made in the convention is entirely erroneous. The truth is that compromise characterized the proceedings of the Convention on every important matter and that the so-called three-fifths compromise and the commerce agreement were not nearly so contentious in character as the older accounts represented them to have been. In fact, the three-fifths compromise had already been accepted as the federal ratio by the Confederation and the commerce agreement concerning slave trade was made in connection with the amendment process. All the plans for the government of the Union proposed that the national legislature should have the power to regulate commerce.<sup>51</sup>

10. *Finishing the Work.* After the broad outlines of the Constitution had been determined, the resolutions of the Convention, twenty-three in number, embodying these general principles together with the various proposals, were referred to a Committee

<sup>49</sup> *Ibid.*, II, 92-93.

<sup>50</sup> A proposal for ratification by 13 states was defeated; one by 10 states was defeated by a small majority; Washington, Madison, and some others favored ratification by 7 states provided they included a majority of the people.

<sup>51</sup> See Schuyler, *op. cit.*, 115. Professor Farrand in his *Framing of the Constitution* and Professor Schuyler in *The Constitution of the United States* give splendid accounts of the compromise character of the work of the Convention.

of Detail, consisting of Rutledge of South Carolina, Randolph of Virginia, Graham of Massachusetts, Ellsworth of Connecticut, and Wilson of Pennsylvania, which was to prepare a detailed draft of the proposed Constitution. The Convention adjourned from July 26 to August 6 to give the committee time to do its work. The committee, in preparing its report, used not only this material but the Articles of Confederation, state constitutions, and suggestions of their own, drawn from other documents, literature, and experience. James Wilson seems to have been primarily responsible for the committee's report, which was made on August 6 and debated by the Convention for five hours a day for five weeks and six hours a day for one week, until September 10. After the report of the committee had been considered and adopted, with several changes having been made, its draft as thus modified was given to a Committee on Style, consisting of Dr. Johnson of Connecticut, Alexander Hamilton of New York, Gouverneur Morris of Pennsylvania, James Madison of Virginia, and Rufus King of Massachusetts. Gouverneur Morris is generally regarded as the penman of the Constitution.<sup>52</sup>

The Convention really finished its work the fifteenth of September. The Constitution was then engrossed and signed the seventeenth. Thirty nine members signed the finished document; Gerry of Massachusetts, Randolph and Mason of Virginia declined to sign; some others had left the Convention in disgust. To present a better appearance to the country, Gouverneur Morris devised the following form of approval: "Done in convention, by the unanimous consent of *the states* present the 17th of September . . . In Witness whereof we have hereunto subscribed our names."<sup>53</sup> This was intended to facilitate ratification.

### ✓ VIII. RATIFICATION

The members of the Convention realized that they were only draftsmen and that the Constitution could acquire validity only by ratification. It had been wisely decided not to ask either Congress or the state legislatures for their approval but to request Congress to send the Constitution to the states for ratification by state conventions freshly elected by the voters for the purpose, the

<sup>52</sup> For a very satisfactory discussion of the work of the Committees of Detail and Style and the reaction of the Convention to their reports, see Farrand's *The Framing of the Constitution*, 124-195.

<sup>53</sup> Farrand, *The Records of the Federal Convention*, II, 665-666.

favorable action of nine such conventions to establish the Constitution between the states so ratifying. Accordingly, the Constitution with a letter from Washington, in which was expressed the spirit of conciliation in which the Convention had worked, constantly keeping in mind "the greatest interest of every true American, the consolidation of our Union, in which is involved our prosperity, felicity, safety, perhaps our national existence," was sent to Congress, which apparently with little enthusiasm and no endorsement, sent it accompanied by Washington's letter to the governors of the states, with the request that they lay the matter before their respective legislatures with a view of their calling an election of delegates to ratify the Constitution in conformity with the request of the Convention.

In obedience to this request the legislatures of all the states except Rhode Island called an election of delegates who assembled at the various state capitols to consider the ratification of the Constitution. A terrific battle was waged against the Constitution by its opponents and for it by its friends. The country was flooded with literature,<sup>54</sup> some of which is still regarded as a classical analysis of the Constitution subordinate in value only to the decisions of the Supreme Court. *The Federalist*, a collection of eighty-five papers written by Madison, Hamilton, and Jay to secure the ratification of the Constitution by the people of New York, while they are, of course, a defense of the Constitution, are nevertheless as free from bias as many of the decisions of the Supreme Court on constitutional questions. *The Federalist*, it should be said, is more than a commentary on our Constitution; many of its numbers partake of the character of a highly scientific treatise on the theory and problems of government in general.

Some of the objections urged by the opponents of the Constitution against its ratification were that: (1) the Constitution puts an end to the venerable Congress; (2) it sets up an aristocracy; (3) it was proposed and is to be ratified by an unconstitutional process; (4) it contains no bill of rights; (5) it grants unlimited power of taxation to Congress in which the vote is by individuals, and not by states; (6) it gives too much power to the federal courts; (7) it provides for the payment of the salaries of Congressmen from the national treasury and thus makes them inde-

<sup>54</sup> "And now," said John Fiske, "there ensued such a war of pamphlets, broadsides, caricatures, squibs, and stump speeches, as had never yet been seen in America. Cato and Aristides, Cincinnatus and Plain Truth, were out in full force." *op. cit.*, 312.

pendent of the states; (8) it delegates too much power to a government that is so remote from its constituents; (9) it sets aside an area ten miles square for a federal city over which absolute supremacy is granted to the national government; (10) it provides for a standing army of which the President is to be commander-in-chief,—does this not make provision for a Cromwell?; (11) it does not recognize the existence of God, nor does it require religious tests for candidates for federal offices.

Not only was the Constitution attacked, but its framers were ridiculed unmercifully. "This Philadelphia convention", it was said, "ought to be distrusted. Some of its members, such as John Dickinson and Robert Morris, had opposed the Declaration of Independence. Pretty men these, to be offering a new government. . . . One thing was sure: the convention had squabbled. Some members had gone home in a huff; others had refused to sign a document fraught with untold evils to the country. And now came James Wilson, making speeches in behalf of this precious constitution, and trying to pull the wool over people's eyes and persuade them to adopt it. Who was James Wilson, anyway? A Scotchman, a countryman of Lord Bute, a born aristocrat, a snob, a patrician, Jimmy, James de Caledonia. Beware of any form of government defended by such a man. And as to the other members of the convention, there was Roger Sherman, who had signed the Articles of Confederation, and was now trying to undo his own work. What confidence could be placed in a man who did not know his own mind any better than that? Then there were Hamilton and Madison, mere boys; and Franklin, an old dotard, a man in his second childhood. And as to Washington, he was doubtless a good soldier, but what did he know about politics? So said the more moderate of the malcontents, hesitating for the moment to speak disrespectfully of such a man; and presently their zeal got the better of them, and in a paper signed 'Centinel' it was boldly declared that Washington was a born fool!"<sup>55</sup>

The matter of inducing the state legislatures to call an election of delegates in the various states to compose the ratifying conventions, as well as their actual election by the voters, offered opportunities to defeat the adoption of the Constitution. The legislatures were abdicating their own constitutional functions in doing this and might naturally be expected to refuse to do it. Were the delegates to the ratifying conventions to be hand-picked or was their selection to be free from manipulation? Were the voters to be

<sup>55</sup> Fiske, *op. cit.*, 312-313.



informed as to the nature of the new system before they selected delegates?

The constitutionalists were a little anxious, speaking mildly, and in several instances resorted to haste, pressure, and very clever tactics in managing the legislatures, the selection of delegates, and the ratifying conventions. They selected men of outstanding character and influence for the chairmen of these conventions and were equally careful in all committee appointments.<sup>56</sup> In general, the commercial classes, the military element,<sup>57</sup> and the men of education, largely found within fifty miles of the Atlantic Coast line, were for the Constitution; however, there are notable exceptions to this generalization. The inhabitants of the Valley of Virginia, western Maryland, Pennsylvania, and that part of Virginia that is now West Virginia were for the Constitution. The frontier settlements, generally dependent upon agriculture, were against the Constitution and so were the debtor and disfranchised classes. The indifference of the voters in general and the 'disfranchisement of the masses through property qualification and ignorance and apathy contributed largely to the facility with which the personalty-interest representatives carried the day.'<sup>58</sup> Of course, they knew the value of the Constitution in dollars and cents, and, therefore, did not hesitate to spend considerable money on pamphlets, parades, demonstrations, and the press.<sup>58</sup> It has been estimated that only about 160,000 people, or about one fourth or one fifth of the adult white males, participated in the selection of delegates.<sup>59</sup> Marshall, writing many years later of the struggle for ratification, said: "Had the influence of character been removed, the intrinsic merits of the instrument would not have secured its adoption. Indeed, it is scarcely to be doubted that in some of the adopting States, a majority of the people were in opposition."<sup>60</sup>

The Constitution was almost immediately ratified by Delaware, Pennsylvania, New Jersey, Georgia, and Connecticut; the first three in December, 1787, and the last two in January, 1788; Massachusetts followed in February; Maryland in April; South Carolina in May; and New Hampshire, the ninth state, June 21st—four days

<sup>56</sup> Possibly the best brief account of the whole process of ratification is Albert J. Beveridge, *The Life of John Marshall* (1916), I, 319-356.

<sup>57</sup> More than one fourth of the Virginia delegates to the ratifying convention of 170 members had been soldiers under Washington and were a unit for the Constitution. *Ibid.*, I, 360.

<sup>58</sup> Beard, *op. cit.*, 251.

<sup>59</sup> *Ibid.*, 250.

<sup>60</sup> John Marshall, *Life of Washington* (Second Ed., 1840), II, 127.

before Virginia ratified. By June 25, 1788, the conventions of ten states had ratified the "child of fortune", as Washington called the Constitution—one more than was necessary to make it the law of the land. There was no serious struggle over ratification in the above states except in Pennsylvania, Massachusetts, and Virginia.

In Pennsylvania, the second state to ratify, the members of the legislature who were against the Constitution absented themselves to break a quorum to prevent the calling of an election of delegates to ratify the Constitution. They were seized, dragged through the streets to the State House, placed in their seats and held there while the majority passed an ordinance calling the Pennsylvania Convention. This was done within a week of the laying of the Constitution before Congress and before the legislature had received a copy of it. In the election of delegates only thirteen thousand voted and the forty-six delegates who were elected received only sixty-eight hundred votes. Thus the Constitution was ratified in Pennsylvania by men who represented less than one tenth of the voters of the state. In Massachusetts, Samuel Adams was the leader of the opposition and the struggle reached a high degree of tension before the ranks of the opponents were sufficiently broken to give the constitutionalists a small majority. At the psychological moment the influence of Washington and Hancock was brought to bear upon the Convention. "If another Federal Convention is attempted," said Washington, "its members will be more discordant, and will agree upon no general plan. The constitution is the best that can be obtained at this time. . . . The constitution or disunion are before us to choose from. If the constitution is our choice, a constitutional door is open for amendments, and they may be adopted in a peaceable manner, without tumult or disorder."<sup>61</sup> John Hancock, the President of the Massachusetts Convention, closed the debate with a strong plea for the Constitution: "That a general system of government is indispensably necessary to save our country from ruin, is agreed upon all sides. That the one to be decided upon has its defects, all agree; but when we consider the variety of interests, and the different habits of the men it is intended for, it would be very singular to have an entire union of sentiment respecting it. . . . I give my assent to the Constitution, in full confidence that the amendments proposed will soon become a part of the system."<sup>62</sup> With Washington's and Hancock's desires and hopes thus expressed the Convention,

<sup>61</sup> Quoted by Fiske, *op. cit.*, 329.

<sup>62</sup> Elliot's *Debates*, II, 175.

after proposing nine amendments, ratified by the small margin of 187 to 168.

In Virginia the struggle over ratification was of national significance. "Our chance of success depends on you," was Hamilton's appeal to Madison, the leader of the Southern Constitutionalists. "If you do well there is a gleam of hope; but certainly I think not otherwise."<sup>63</sup> Virginia's record in the Revolution, the eminence of Washington, Jefferson, Henry, and Madison, and her large population made her almost indispensable to the union. "Her population," says Grigsby, "was over three-fourths of all that of New England; . . . not far from double that of Pennsylvania; . . . or from three times that of New York . . . over three-fourths of all the population of the Southern States; . . . and more than a fifth of the population of the whole Union."<sup>64</sup> The Virginia situation was critical because Governor Randolph who had introduced in the Federal Convention the Virginia Proposal refused to sign the Constitution at the close of the work of the Convention and advocated a second Convention to propose amendments; George Mason, another able delegate, declined to sign the Constitution; and Patrick Henry, whom General Knox called an "overwhelming torrent", had refused to attend the Federal Convention and was now opposing the ratification of the Constitution with all of his force. Washington and Madison by agreement, flattery, and subtlety were finally able to convert Randolph into a supporter of the Constitution, and they very carefully picked outstanding men like Pendleton, Wythe, Blair, and Innes as candidates for seats in the convention.<sup>65</sup> In this way they prepared to meet the broadsides of Henry. In the beginning of the debate in the Virginia Convention, Henry demanded of "the worthy characters" from Virginia "who composed a part of the Federal Convention that proposed a consolidated government", who authorized them to speak the language of, *We, the people*, instead of, *We, the states*? "States are the characteristics and soul of a Confederation. If the states be not the agents of this compact, it must be one great,

<sup>63</sup> Hamilton to Madison, June 27, 1788, *Works* (Lodge Ed.), IX, 436. Virginia had already ratified the Constitution but Hamilton did not know it.

<sup>64</sup> Hugh Blair Grigsby, *The History of the Virginia Federal Convention of 1788* (1815), I, 8.

<sup>65</sup> "The Virginia convention," said Beveridge, was "a striking and remarkable body. Judges and soldiers, lawyers and doctors, preachers, planters, merchants, and Indian fighters were there. Scarcely a field fought over during the long, red years of the Revolution but had its representative on that historic floor. Statesmen and jurists of three generations were members." *op. cit.*, I, 367.

consolidated, national government of the people of all the states.”<sup>66</sup> Randolph answered Henry’s question by stating that “the government is for the people; and the misfortune was, that the people had no part in the government before.”<sup>67</sup> Pendleton inquired, “who but the people have a right to form government . . . What have the state governments to do with it?”<sup>68</sup> “I conceive myself,” said Madison in reply to Henry’s contention that a consolidated government was proposed, “that it is of a mixed nature; it is in a manner unprecedented; we cannot find one express example in the experience of the world. It stands by itself. In some respects it is a government of a federal nature; in others, it is of a consolidated nature.”<sup>69</sup> After more than three weeks of critical debate, the Constitution was ratified by a vote of 89 to 79, amendments, however, being proposed as in Massachusetts, South Carolina, and Maryland.

Ratification in New York State was of almost as much importance as that of Virginia; for, while this state ranked only fifth in population, it was the military and commercial center of the Union. It was regarded as so necessary to the Union that it was proposed to conquer it and force it to adopt the Constitution. When the New York convention met, more than two-thirds of its members were against the Constitution under the leadership of Governor Clinton, Yates, and Lansing, former delegates to the Federal Convention, and Melancthon Smith, one of the ablest debaters in the country. The constitutionalists were under the leadership of Alexander Hamilton ably supported by Livingston and Jay. The burden of the fight for the Constitution fell upon the shoulders of Hamilton. After weeks of argument, he succeeded in winning over Smith to the support of the Constitution and thus dividing the opposition. The Constitution was ratified by the convention of New York State July 26, 1788, by a vote of 30 to 27—one vote to spare. The North Carolina convention met July 21 and adjourned without acting on the Constitution. Rhode Island did not call a convention at first; the paper money advocates controlled both of these states. Washington had been President several months before these states joined the New Union; North Carolina November 21, 1787, and Rhode Island May 29, 1790.

The ratification of conventions in nine states brought the Con-

<sup>66</sup> Elliot’s *Debates*, III, 22.

<sup>67</sup> *Ibid.*, III, 28.

<sup>68</sup> *Ibid.*, III, 37.

<sup>69</sup> *Ibid.*, III, 94.



stitution again before Congress, which, complying with the request of the Convention, made provision for putting the Constitution into operation, thus decreeing its own demise. It set the first Wednesday in January, 1789, as the date for elections of national officers, the first Wednesday in March as the date of the inauguration of the President, and fixed New York as the temporary seat of the government. The states complied with their duties under the Constitution in calling elections, national officers were elected and inducted into office, and the new government began to operate.

Thus was accomplished pacifically one of the most significant political revolutions in all history—far eclipsing the “Glorious Revolution of 1688” in the scope of its influence and the character of its constitutional innovations. This “Great Revolution,” as Marshall called it, was effected by a convention which was called by Congress without authority and at the request of a few men and to which delegates were selected by the state legislatures, seven of them taking such action before the Convention was called by Congress. The Convention met and drafted a constitution, and then requested Congress and the state legislatures to permit ratification by conventions of delegates in the states, the favorable action of nine such conventions having the effect of establishing the Constitution, which method of ratification was incorporated in the Constitution. Congress and the legislatures obeyed, thus putting into effect a provision of the Constitution before the instrument itself had been adopted. Congress could have considered the proposal of the Convention, adopted, or modified it, thus giving it the character of an amendment, and then sent it to the states for the unanimous ratification of their legislatures. This procedure, if it had been successful, would have constitutionally established the new order by state action. The Convention, however, did not want this procedure followed. Congress and the legislatures chose to follow the will of the Convention rather than the amendment process of the Articles of Confederation.<sup>70</sup> What the convention did, “stripped of all fiction and verbiage,” said an eminent authority, “was to assume constituent powers, ordain a constitution of government and of liberty, and demand the plebiscite thereon, over the heads of all existing legally organized powers. Had Julius or Napoleon committed these acts, they would have been pronounced a coup d’état.”<sup>71</sup>

<sup>70</sup> *Ibid.*, I, 414 ff., and *v.*, 197, 216.

<sup>71</sup> Burgess, *op. cit.*, I, 105.

## CHAPTER VI

### THE PRINCIPLES OF THE CONSTITUTION

The American conception of a constitution was stated in 1795 by William Paterson, the proposer of the New Jersey Plan of Union and one of the earlier justices of the Supreme Court, as follows: "It is a form of government delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established. The Constitution is certain and fixed: it contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the legislature, and can be revoked or altered only by the authority that made it. The life-giving principle and the death-doing stroke must proceed from the same hand. What are the legislatures? Creatures of the Constitution: they owe their existence to the Constitution; they derive their powers from the Constitution. It is their commission; and, therefore, all their acts must be conformable to it, or else they will be void. The Constitution is the work or will of the people themselves, in their original, sovereign, and unlimited capacity. Law is the work or will of the legislature in their derivative or subordinate capacity. The one is the work of the creator, the other of the creature."<sup>1</sup> Justice Story said that "a constitution is a fundamental law or basis of government . . . established by the people in their original capacity." "The distinction between a constitution and a confederation," he said, "is well known, and understood. The latter, or at least a pure confederation, is a mere treaty or league between independent states, and binds no longer than during the good pleasure of each. It rests forever in articles of compact, where each is, or may be, the supreme judge of its own rights and duties. The former is a permanent form of government where the powers, once given, are irrevocable, and cannot be resumed or withdrawn at pleasure. Whether formed by a single people, or by different societies of the people, in their political capacity, a constitution, though originating in consent, becomes, when ratified,

<sup>1</sup> *Van Horn v. Dorrance* (1795), 2 Dallas 304.

obligatory, as a fundamental ordinance or law.”<sup>2</sup> A constitution,” according to Judge Cooley, “is sometimes defined as the fundamental law of a state, containing the principles upon which the government is founded, regulating the division of the sovereign powers, and directing to what persons each of these powers is to be confided, and the manner in which it is to be exercised.”<sup>3</sup>

These definitions are not particularly important for their accuracy but for the general conception that a constitution is a fundamental law. The Articles of Confederation was styled “a firm league of friendship,”<sup>4</sup> but the instrument proposed by the Federal Convention of 1787 and later ratified by state conventions is called a constitution. This word was generally understood at the time to signify “a fundamental law, unchangeable and indissoluble except in the manner therein indicated, or by revolution.”<sup>5</sup>

Before studying the structure and workings of the machinery of our government, it seems fitting and proper to learn something of the principles of the Constitution which constitute the broad outlines of the operation of the government.

## I. POPULAR SOVEREIGNTY

At the time the Federal Convention was called, it was generally believed that whatever changes in the Articles of Confederation were proposed by the Convention would be submitted to Congress and the state legislatures for approval. In fact the call for the convention issued by Congress specifically stated that it was to report “to Congress and the several legislatures, such alterations and provisions therein, as shall, *when agreed to in Congress, and confirmed by the States*, render the federal Constitution adequate to the exigencies of Government, and the preservation of the Union.”<sup>6</sup> If this process of giving legal effect to the Constitution had been followed, it would have amounted to the exercise of *constituent powers* by Congress and the legislatures. It would have been following the English practice of parliamentary sovereignty under which theory there is no difference in the legal

<sup>2</sup> *Commentaries on the Constitution of the United States* (Abridged Ed., 1833), 118.

<sup>3</sup> Thomas M. Cooley, *A Treatise on the Constitutional Limitations* (Eighth Ed., 1927), I, 4.

<sup>4</sup> Art. III.

<sup>5</sup> Roger Foster, *Commentaries on the Constitution of the United States* (1895), I, 103.

<sup>6</sup> *Documentary History of the Constitution of the United States of America*, I, 8.

validity of an act of legislative body dealing with a constitutional question and one relating to any other subject matter. Under such a system the legislative agent is superior in authority to the constitution, and can, therefore, change it at will. There are no constitutional limitations on the exercise of its authority, but only political restraints.

The conception of a constitution as a fundamental law paramount to legislative acts was in process of development prior to the Revolution. Under the first state constitutions adopted immediately after the issue of the Declaration of Independence, the state courts began to nullify the acts of state legislatures when in their opinion they contravened the provisions of the state constitutions.<sup>7</sup> To give logical expression to this principle it was necessary to develop some other method for the making of constitutions than the legislative process. If constitutions were the acts of legislative bodies in the first instance, it would appear that they could be changed by the same process. The state constitutional convention was devised during the transitional period (1776-87) to serve as the means by which the people in their original capacity could propose a constitution and later vote on its acceptance or rejection without the use of the legislative machinery. By the use of this method, it was felt that a constitution would acquire a superior validity to legislative authority and become the expression of popular sovereignty.

Having used this method for the adoption of the state constitutions, it was natural and logical to employ the same process for the adoption of the national constitution, if it was to be regarded as a fundamental law and the principle of popular sovereignty exercised. Since the people had established the constitutional order then existing in the states, it would seem that fundamental changes in this order would require their consent. Madison, in the Federal Convention, referring to the changes contemplated by the new Constitution, said: "These changes would make essential inroads on the State Constitutions, and *it would be a novel and a dangerous doctrine that a legislature could change the constitution under which it held its existence.*"<sup>8</sup>

Hence, it was decided to incorporate the principle of popular sovereignty in the national constitution, and place it upon the same basis as the state constitutions. The Preamble of the Con-

<sup>7</sup> Charles Grove Haines, *The American Doctrine of Judicial Supremacy* (1914), 63-121.

<sup>8</sup> Max Farrand, *Records of the Federal Convention*, II, 93.



stitution says, "We, the people of the United States . . . do ordain and establish this Constitution for the United States of America." This made the Constitution an enactment of the people of the United States, acting in their state capacities, and gave it the character of a fundamental law rather than that of a treaty proposed by a set of state delegates and later ratified by states. "The Convention which framed the Constitution," said Marshall, "was, indeed, elected by state legislatures. But the instrument when it came from their hands, was a mere proposal, without obligations, or pretensions to it. It was reported to the then existing Congress of the United States, with a request that it might be submitted to a convention of delegates, chosen in each state by the *people thereof*, under the recommendation of its legislature, for their assent and ratification. This mode of proceeding was adopted; and by the convention, by congress, and by the state legislatures, the instrument was submitted to the *people*. They acted upon it, in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in convention. It is true, they assembled in their several states; and where else should they assemble? No political dreamer was wild enough to think of breaking down the lines which separate the states, and of compounding the American people into one common mass. As a consequence, when they act, they act in their states. But the measures they adopt do not, on that account, cease to be measures of *the people themselves*, or become the measures of the state government.

"From these conventions, the Constitution derives its whole authority, the government proceeds directly from *the people*; is ordained and established in the name of the people."<sup>9</sup>

"So with us," it has been well said, "we have no sovereign but the people; not the President, not the Congress, not even the United States Government; while in England the Parliament is sovereign, though, by a fiction, it is called the King *in* Parliament. Practically, whatever the House of Commons does is constitutional and right, though it were elected but yesterday. But our people have never parted with their sovereignty, and our courts are here to guard it. And they kept that sovereignty in their own hands, first, in order to guard themselves against usurpation of the Federal Government; second, to assure to themselves and their posterity the enjoyment of those rights, liberties, and protections which their own history had taught them to be essential."<sup>10</sup>

<sup>9</sup> *McCulloch v. Maryland* (1819), 4 Wheaton 316.

<sup>10</sup> Frederick Jesup Stimson, *The American Constitution* (1923), 26.

There is not a single power possessed by either the national government or the state governments that the people cannot withdraw. They could make the United States into a unitary republic like France, a limited monarchy like Great Britain, a centralized federalism like Canada, a soviet system like Russia, a socialist state, or an anarchy. These changes could be legally effected by amending the Constitution or abolishing it, or by revolution upon which right the American system of government is founded.

The idea should not be conveyed that popular sovereignty does not work under certain limitations except on a revolutionary basis. It is limited, as long as it works under the Constitution, by the representative principle. It can secure its ends only through the representatives in Congress who are themselves constitutionally limited, but, supposing there is no constitutional barrier to the enactment of the popular will, there is still the task of persuading the representatives to do it. The public is not organized for this purpose. While representative government came into existence as a limitation on royal authority, after the relocation of sovereignty in the people, it is logical and necessary that it operate as a restriction on the arbitrary will of the people. It requires considerable time for the principle of popular election to effect a change in the opinion of Congress, due to their terms of office. Also, since Congress has very little control over the executive and judiciary, the national government is only partly representative in character. The fundamentals of representative government have been well stated as follows:

"1. That the people shall be free to choose whom they will to represent them.

2. *That the representative assembly shall be face to face with the administration.*

3. That the representatives shall be so circumstanced that they can use their authority only on public account.

4. That elections shall be confined to the choice of representatives.

5. *That the supervision and control of the representative assembly shall extend over the whole field of government."*<sup>11</sup>

It is here pointed out that representative government means a great deal more than merely having representatives in the legis-

<sup>11</sup> Henry J. Ford, *Representative Government* (1924), 158. The italics are the author's and are not intended to express a preference as to the value of these five fundamentals of representative government but to indicate certain features in which our national government is *possibly* most unrepresentative.

lative body of a government. It assumes that the voters are free from all coercion in the selection of representatives, that the electoral system truly expresses their free choice, and that the representatives, when selected on a basis of personal fitness independent of issues, have, in all their activities whether of a legislative or a supervisory nature, complete discretion. This principle was well expressed by Burke to the constituency of Bristol as follows: "His unbiased opinion, his mature judgment, his enlightened conscience, he ought not to sacrifice to you, to any man or to any set of men living. . . . Your representative owes you, not his industry only, but his judgment; and he betrays you instead of serving you, if he sacrifices it to your opinion. . . . Government and legislation are matters of reason and judgment, and not of inclination; and what sort of reason is that in which one set of men deliberate and another decide, and where those who form the conclusion are perhaps three hundred miles distant from those who hear the arguments."<sup>12</sup> It was believed by Mill that the representative principles secured "to the representative body the control of everything in the last resort."<sup>13</sup> Of course, as Professor Sait says, it is "difficult to decide upon the amount of discretion and independence that may safely be lodged with public servants."<sup>14</sup> "A representative," says an eminent authority on the relation of a representative to his constituents, "never feels absolutely bound to follow their directions in all matters."<sup>15</sup> Regardless of how the representative principle is modified, as long as it is not abolished, it acts as a limitation on popular sovereignty.<sup>16</sup>

Popular sovereignty is further limited by our party system. While parties are organizations of the voters and may be regarded, therefore, as their agents, it may be questioned at least whether the voters control their agents. The political ignorance and indifference of the voters practically disfranchise them and give right of way to control from above. They are told not only for what to vote but for whom to vote, and they usually obey. This eliminates their free choice and thus abridges, if it does not abolish, popular control. Parties are intervening agents between the voters and their representatives and thus place the voters one step further

<sup>12</sup> Edmund Burke, *Works*, II, 95-96.

<sup>13</sup> John Stuart Mill, *Utilitarianism, Liberty and Representative Government* (Everyman's Library), 229.

<sup>14</sup> Edward M. Sait, *American Parties and Elections* (1927), 84.

<sup>15</sup> A. Lawrence Lowell, *Public Opinion and Popular Government* (1921), 125.

<sup>16</sup> Arnold Bennett Hall, *Popular Government* (1921), 45-63.

away from their government—whether wisely or not is not the subject of discussion here; it is the recognition of the fact that is suggested.<sup>17</sup>

There is also the invisible government, which in a sense is a part of the party system in that the party bosses are generally involved. But the invisible government embraces hundreds of organizations which dictate to the party bosses who in turn use the party and its proxies, the officeholders, to accomplish the demands of these organizations. These organizations are usually represented at Washington by the most able agents that money will secure. Kent, speaking of these organizations, says: "Of the 145 who have headquarters in Washington there are, perhaps, sixty who are really effective, with sufficient financial or voting strength back of them to compel consideration." These men are organized into the Monday Lunch Club, and are, according to Kent, "perhaps, the most influential group of men in the country."<sup>18</sup>

Of course, the suffrage qualification is another limitation which eliminates about one half of our population from participating in the control of the body politic. Then only fifty per cent of this one-half actually votes in the election of national officers. This per cent is divided into a majority and a minority at the ballot box, ending in the selection of the officials of government by the majority of those who actually vote but a minority of the qualified voters and only a fraction of the people as a whole.

The conclusion is finally forced upon us that while the Constitution is based upon popular sovereignty, it is exceedingly difficult, if not impossible, to realize this ideal in the practical workings of politics. It is always necessary to go behind mere forms if one wishes to find the true processes by which things are done. This is true in the very nature of things—whether it is a government, a club, a church, a fraternity, or an educational institution—that is being controlled. Any one who endeavors to understand the workings of institutions will never become very well informed on the subject if he is content with the examination of mere documents.

## II. LIMITED GOVERNMENT

The governments of Great Britain and the United States are governments of law, but in the former the will of the government

<sup>17</sup> Albert M. Kales, *Unpopular Government in the United States* (1914), 39-60.

<sup>18</sup> Frank R. Kent, *The Great Game of Politics* (1923), 271.



is law while in the latter the will of the government is always subject to the Constitution and is not law unless it is in harmony with that instrument. A government that operates under its own law is in a very different situation from one that must act according to a supreme law which it cannot change. The one is a law unto itself; the other is a limited government. The government of the United States is preëminently of the latter type.

How is the government of the United States limited? First, it is limited by a written constitution. "In American constitutional law, the word *constitution* is used in a restricted sense, as implying the written instrument agreed upon by the people of the Union, or of anyone of the States, as the *absolute rule* of action and decision for all departments and officers of the government, in respect to all the points covered by it, which must control until it shall be changed by the authority which established it, and in opposition to which any act or regulation of such department or officer, or even of the people themselves, will be altogether void."<sup>19</sup> Justice Field, in commenting on the validity of legislative acts, said: "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is in legal contemplation, as inoperative as though it had never been passed."<sup>20</sup>

Second, the government of the United States is one of only enumerated powers. It has only such powers as have been considered necessary to give it control of purely national matters. It is very far from being a general government like that of France or Great Britain. If a matter that was local becomes national in character by virtue of changes in our society, it does not automatically fall within its jurisdiction, but can be so placed only by a constitutional amendment. While it is limited in number of powers, it is practically unlimited in the extent and means of their exercise. "This government," said Chief Justice Marshall in 1819, "is acknowledged by all to be one of enumerated powers. . . . But the question respecting the extent of the powers actually granted is perpetually arising and will probably continue to arise as long as our system shall exist. . . . But we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial

<sup>19</sup> Cooley, *op. cit.*, I, 5.

<sup>20</sup> *Norton v. Shelby County* (1886), 118 U. S. 425.

to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited but consist with the letter and spirit of the Constitution, are constitutional.”<sup>21</sup>

Third, the national government is limited by the doctrine of separation of powers. By this doctrine the powers of government are classified as executive, legislative, and judicial, and each class of powers is assigned to a separate agent which alone can exercise them. It is obvious that in such a system, neither branch of the government could arrogate to itself the powers of the other two and thus become a government by itself. Since also neither would have the power to coerce the other, the action of the government would be limited to cases in which these agents acted in unison.

The forefathers believed that the English government was of this type, that the reason for their trouble with it was that Parliament was usurping the powers of the Executive, and that this sort of thing could be prevented if this doctrine was inserted in a written constitution that was the supreme law of the land. They secured the doctrine from Montesquieu and Blackstone, who were in their opinion the two great authorities on the English constitution. “When the legislative and executive powers are united in the same person, or in the same body of magistrates,” says Montesquieu, “there can be no liberty; because apprehension may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

“Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

“There would be an end of everything, were the same man, or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.”<sup>22</sup> “In all tyrannical governments”, said Blackstone, “the supreme magistracy, or the right both of making and of enforcing the laws, is

<sup>21</sup> *McCulloch v. Maryland* (1819), 4 Wheaton 316.

<sup>22</sup> *Spirit of Laws* (Sixth Ed. tr. by Thomas Nugent), Bk. XI, Ch. 6, 154. Montesquieu, a French political philosopher of the eighteenth century, made a special study of the English government and published his two volumes on *The Spirit of the Laws* about 1748. He, however, was in error in thinking that any real separation of powers prevailed in the English

vested in one and the same man or one and the same body of men; and whenever these two powers are united together, there can be no public liberty.”<sup>23</sup>

“The British Constitution was to Montesquieu,” said Madison, “what Homer has been to the didactic writers on epic poetry. As the latter have considered the work of the immortal bard as the perfect model from which the principles and rules of epic art were to be drawn, and by which all similar works were to be judged, so this great political critic appears to have viewed the Constitution of England as the standard, or, to use his own expression, as the mirror of political liberty, and to have delivered, in the form of elementary truths, the several characteristic principles of that particular system.”<sup>24</sup>

The doctrine of separation of powers was first incorporated in our state constitutions,<sup>25</sup> finding its most adequate expression in the Massachusetts Constitution of 1780 as follows: “In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them, to the end it may be a government of laws and not of men.”<sup>26</sup> This doctrine was not embodied in the Articles of Confederation because the government established by the Articles really consisted of only one department, but in the Constitution of 1787, it was clearly incorporated, although not very specifically.<sup>27</sup> “All legislative powers herein granted shall be vested in a Congress of the United States,”<sup>28</sup> “the executive power shall be vested in a President of the United States of America;”<sup>29</sup> and “the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as

government. Madison called attention to this: “On the slightest view of the British Constitution, we must perceive that the legislative, executive, and judiciary departments are by no means totally separate and distinct from each other.” *Federalist*, XLVII.

<sup>23</sup> *Commentaries*, Bk. I, Ch. ii, 146.

<sup>24</sup> *Federalist*, No. XLVII.

<sup>25</sup> Several of the early state constitutions embodied this doctrine. See Arthur N. Holcombe, *State Government in the United States* (Rev. Ed., 1926), 53-58.

<sup>26</sup> Francis N. Thorpe, *Federal and State Constitutions* (1909), (7 vols.) 1893.

<sup>27</sup> The failure of the Constitution to state this doctrine definitely was made one of the strongest objections to it. See *The Federalist*, No. XLVII.

<sup>28</sup> *The Constitution*, Art. I, Sec. i.

<sup>29</sup> *Ibid.*, Art. II, Sec. i.

the Congress may from time to time ordain and establish.”<sup>30</sup> Madison did not understand that the Montesquieu doctrine meant a total separation of the powers of all the departments of government. He maintained that the different departments could have a “partial agency” in the exercise of one another’s powers without violating this doctrine and that it was only “where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted.”<sup>31</sup>

The courts in construing this doctrine as expressed in the Constitution have adopted Madison’s interpretation.<sup>32</sup> “Authority in one department of government”, says Cooley, “to interfere with another will always be strictly construed.”<sup>33</sup> “It is not a correct statement of the principle of separation of powers,” says Willoughby, “to say that it prohibits absolutely the performance of one department of acts which, by their essential nature belong to another. Rather, the correct statement is that a department may constitutionally exercise any power, whatever its essential nature, which has, by the constitution, been delegated to it, but that it may not exercise powers not so constitutionally granted, which, from their essential nature, do not fall within its division of governmental functions, unless such powers are properly incidental to the performance by it of its own appropriate functions.”<sup>34</sup>

If a power is granted to a department, it makes no difference what its nature is, that department can exercise it. If the former is not definitely and distinctly executive, legislative, or judicial in character, it is a recognized principle that the legislative department has the right to decide what department shall exercise it.

In line with Madison’s idea of a “partial agency” of the departments in one another’s action, the principle of checks and balances was introduced to prevent any one of the departments from exercising its own powers in an arbitrary way. This principle, while it was regarded as a part of the doctrine of separation of powers, is directly opposed to the practical execution of this doctrine. Legislation is subject to a suspensive veto of the executive and may be

<sup>30</sup> *Ibid.*, Art. III, Sec. i.

<sup>31</sup> *Federalist*, No. XLVII.

<sup>32</sup> See *Kilbourn v. Thompson* (1880), 103 U. S. 168, 169; *Merrill v. Sherburne* (1818), 1 N. H. 199; *Maynard v. Hill* (1888), 125 U. S. 190, 204, 205, and *Ex parte Grossman* (1925), 267 U. S. 87.

<sup>33</sup> *Op. cit.*, I, 91, footnote 1.

<sup>34</sup> W. W. Willoughby, *Constitutional Law of the United States* (1910), II, 1263.



further reviewed by the courts and held void. It must in the first instance secure the approval of both houses of Congress. Certain acts of the executive are subject to the approval of the courts. The executive may be impeached by Congress and removed from office. If his acts are criminal in character, he is subject to criminal prosecution. The judges of the courts may be impeached and removed from office by Congress. The appointments of the executive must be approved by the Senate as well as the treaties which he negotiates. Congress can prescribe the rules of procedure for the courts and the executive can refuse to enforce their decisions. It is thus seen that, while the doctrine of separation of powers, if applied strictly, would make each department independent in the exercise of its powers, the principle of checks and balances enforces a certain amount of coöperation which is necessary to give effect to the acts of the various departments and thus becomes a limitation on the government as a whole.

It should be noticed in this connection, however, that the development of party government in the United States has done violence to this doctrine. It makes the doctrine more rigid at times and abolishes it in other instances. If the majority of the two houses of Congress are of different politics, or if the President differs from Congress in political affiliation, it will likely be difficult to pass constructive legislation, because the doctrine of separation of powers becomes a partisan instrument. If the President and the Senate differ in politics, then treaty-making becomes almost impossible, and the President's appointments, which require the approval of the Senate, are likely to be rejected or become a matter of bartering. On the other hand, if all the departments of the government are in the possession of the same party with good majorities so as to withstand either defection in the party in power or the opposition of the minority party, this doctrine is practically abolished and the government works on the basis of the unwritten constitution. The forefathers' intention to prevent "an unjust combination of the majority" has only partially been realized.

### III. LOCAL SELF-GOVERNMENT

The federal principle is one of the most fundamental features of the Constitution and in a modified form has been widely copied.<sup>35</sup> This principle took the direction of providing for local

<sup>35</sup> Canada, Australia, Mexico, Brazil, and Argentina are the most notable examples.

self-government. The division of powers between the national and state governments was so arranged as to leave the more vital matters of individual and property rights in the possession of the state authorities. The forefathers had learned from their experience with the Parliament of Great Britain the difficulties involved in the control of internal matters under a distant and centralized government. In fact the colonists had struggled for one hundred and fifty years for local autonomy. It was natural, therefore, when they separated from Great Britain and drafted their first state constitutions, for them to make this right one of their fundamental principles. The constitutions of New Hampshire, Massachusetts, Maryland, and Pennsylvania stated in substance that these states shall have the sole and exclusive right of regulating internal matters. In the Federal Convention, Charles Pinckney said: "No position appears to me more true than this: that the General Gov. can not effectually exist without reserving to the States the possession of their local rights. They are the instruments upon which the Union must frequently depend for the support and execution of their powers, however immediately operating upon the people, and not upon the states."<sup>36</sup> The incompetence of the individual states to legislate on certain matters was made the basis of the line of federalism. Whatever matters could be exclusively handled by state authorities were left in their hands. The principle of local government was extended to other matters over which both the national and state governments were given jurisdiction. Madison in discussing this subject said: "The powers reserved to the States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people and the internal order, improvement and prosperity of the State."<sup>37</sup>

The footing of security on which local government rests in the United States is:

First, that the present political and territorial integrity of the states is guaranteed by the United States against invasion or domestic violence.<sup>38</sup>

Second, that no change in this status can be made without the consent of the state legislatures or the people through conventions in three-fourths of the states.

Third, that the equal representation of the states in the Senate cannot be changed without the consent of all the states.<sup>39</sup>

<sup>36</sup> Hunt and Scott, *Debates in the Federal Convention*, 161.

<sup>37</sup> *The Federalist*, No. XLV.

<sup>38</sup> *The Constitution*, Art. IV, Sec. 4.

<sup>39</sup> *Ibid.*, Art. V.

Fourth, that the agents or instrumentalities of the states cannot be taxed by the national government and thus be crippled in the exercise of their functions. "It is admitted," said Justice Nelson, "that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the states, nor is there any prohibiting the states from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government."<sup>40</sup>

Fifth, that a republican form of government is guaranteed to the states by the United States. Congress is the judge of what is a republican form of government and of the means of enforcing its decision. "Under the fourth article of the Constitution, it rests with Congress to decide what government is the established one in a state. For as the United States guarantees to each state a republican government, Congress must necessarily decide what government is established in the state, before it can determine whether it is republican or not."<sup>41</sup>

The general attitude of the forefathers on this subject has been fittingly summarized as follows: "The framers knew from experience, and they intended to preserve the principle, that a local government is a responsible government—a government which can never long be conducted in defiance of the opinions, desires, or prejudices of the governed; they knew that a distant and centralized government had been and could be conducted otherwise; and they were not inclined to authorize such a central government to interfere with or administer their local affairs, unless absolutely necessary for the safety, welfare, and permanence of the nation as a nation."<sup>42</sup>

#### IV. NATIONAL SUPREMACY

While the principle of the integrity of the states is fundamental in our system of government and will be maintained by the courts in last resort if it is unconstitutionally violated by the national government, it is equally essential to the preservation of the divi-

<sup>40</sup> *The Collector v. Day* (1871), 11 Wallace 113.

<sup>41</sup> *Luther v. Borden* (1849), 7 Howard 42.

<sup>42</sup> Charles Warren, *Congress, The Constitution, and the Supreme Court* (1925), 27.

sion of powers and our federalism for the powers of the national government to be guarded against invasion by the state governments. The supremacy of the national government in our federal system in the exercise of its own powers is necessary, otherwise a part of the union could restrict the action of the rest of the nation and in the end by the action of its parts the powers of the national government would be reduced to the level of those of the Confederation. "The maintenance of this supremacy unimpaired," says Willoughby, "while at the same time preserving to the states their autonomy and independence of action has, however, been a difficult task; and so long as the federal form is retained, this task will continue to tax to the utmost the legal and political abilities of our courts and political bodies."<sup>43</sup>

It is now a recognized principle of American constitutional law that the national government has the power to enforce its laws or protect its rights at any time or place within its territorial limits regardless of the resistance of individuals or state officials, whether or not they are acting under the color of state law. "The States have no power," said Chief Justice Marshall, "by *taxation or otherwise*, to retard, impede, burden or in any manner control the operations of the *constitutional* laws enacted by congress to carry into execution the powers vested in the Federal Government. This is, we think, the unavoidable consequence of that supremacy which the Constitution has declared."<sup>44</sup>

National supremacy is maintained by the following methods:

1. *The agencies of the national government* are free from state taxation, but the property of such agencies is subject to taxation in common with other similar property. "We think," said Chief Justice Chase, "there is a clear distinction between the means employed by the government and the property of agents employed by the government. Taxation of the agency is taxation of the means: taxation of the property of the agents is not always, or generally, taxation of the means."<sup>45</sup> Franchises or other rights derived from the national government enjoy immunity from state taxation.<sup>46</sup> Patented articles cannot be discriminated against,<sup>47</sup> nor

<sup>43</sup> Willoughby, *op. cit.*, I, 78.

<sup>44</sup> *McCulloch v. Maryland* (1819), 4 Wheaton 316. The italics in the quotation are the author's and indicate the futility of state resistance provided the national government is exercising its constitutional rights.

<sup>45</sup> *Thomson v. Union Pacific Ry. Co.* (1869), 9 Wallace 579.

<sup>46</sup> *California v. Central Pacific Ry. Co.* (1888), 127 U. S. 1.

<sup>47</sup> *Webber v. Virginia* (1880), 103 U. S. 334; *Allen v. Riley* (1906), 203 U. S. 347.



may the enjoyment of an occupation authorized by a Federal license be restricted.<sup>48</sup> The salaries or other emoluments of Federal officers<sup>49</sup> or the securities of the United States are free from the taxing power of the states. "The tax on government stock," said Marshall, "is thought by this court to be a tax on the contract, a tax on the power to borrow money on the credit of the United States, and consequently to be repugnant to the Constitution."<sup>50</sup> A state franchise tax on a state institution is valid even if the United States holds stock in the institution.<sup>51</sup> Income from interest on the United States securities are not subject to state taxation,<sup>52</sup> nor is federal property.<sup>53</sup>

2. *Review by the Supreme Court of the United States* of decisions of state courts adverse to privileges, rights, or immunities claimed under the Constitution or Laws of the United States and Treaties. "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or a statute of the United States and the decision is against their validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity, may be re-examined and reversed or affirmed in the Supreme Court upon writ of error."<sup>54</sup> The same authority may be exercised by writ of certiorari.<sup>55</sup>

In all federal systems of government, conflicts between national and local authorities will inevitably arise, and the decision of these must rest with the central authority, which alone can act for the nation. In our system, the Supreme Court of the United States is the final authority for the settlement of all disputes involving

<sup>48</sup> *Moran v. New Orleans* (1884), 112 U. S. 69; *Harman v. Chicago* (1893), 147 U. S. 396.

<sup>49</sup> *Dobbins v. Commissioners* (1842), 16 Peters 435.

<sup>50</sup> *Weston v. Charleston* (1829), 2 Peters 449. See also *Banks v. The Mayor* (1868), 7 Wallace 16; *Bank v. Supervisors* (1868), 7 Wallace 26; and *Home Savings Bank v. Des Moines* (1907), 205 U. S. 503.

<sup>51</sup> *Home Insurance Co. v. New York* (1889), 134 U. S. 594.

<sup>52</sup> *Pollock v. Farmers' Loan & Trust Co.* (1895), 157 U. S. 429.

<sup>53</sup> *Van Brocklin v. Tennessee* (1885), 117 U. S. 151.

<sup>54</sup> *The Code of the Laws of the United States of America* (1925), Title 28, Ch. 9, Sec. 344.

<sup>55</sup> A writ of error is technically a writ of appeal and is granted to the appellant on an "assignment of error" in which the reasons for appeal are stated. A writ of certiorari is a command from a higher court to a lower to send up the record of the case in question. A writ of appeal, if granted, causes a retrial of the case on its merits; a writ of certiorari requires a review of only the record.

the Constitution, the laws, and treaties of the United States. Since such disputes must frequently first arise in state courts, it is necessary to the exercise of this authority for the appellant jurisdiction of the Supreme Court to extend to such disputes.<sup>56</sup>

3. *The Removal of Cases from State to National Courts.* "The United States," said Justice Strong, "is a government with authority extending over the whole territory of the Union, acting upon the states and the people of the states, while it is limited in the number of its powers, so far as its authority extends, it is supreme. No state government can exclude it from the exercise of any authority conferred by the Constitution, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject, which that instrument has committed to it. . . . The constitutional right of Congress to authorize *the removal before trial of civil cases* arising under the laws of the United States has long since passed beyond doubt. It was exercised almost contemporaneously with the adoption of the Constitution, and the power has been in constant use ever since. . . . If there is power in Congress to direct removal before trial of a civil case arising under the Constitution or laws of the United States, and direct its removal because such a case has arisen, it is impossible to see why the same power may not order *the removal of a criminal prosecution*, when a similar case has arisen under it. The judicial power is declared to extend to all cases of the character described, making *no distinction between civil and criminal*, and the reasons for conferring upon the courts of the national government superior jurisdiction over cases involving authority and rights under the laws of the United States, are equally applicable to both. . . . Such a jurisdiction is necessary for the preservation of the acknowledged powers of the government. It is essential, also, to an uniform and consistent administration of national laws."<sup>57</sup>

4. *Writ of Habeas Corpus.*<sup>58</sup> In 1859 it was held by the Supreme Court that the state courts cannot interfere in any way with the work of the national courts or other agencies of the national government. In this instance the state of Wisconsin by judicial process released a prisoner from the custody of the national authorities. When the case was finally brought before the Supreme

<sup>56</sup> *Martin v. Hunter's Lessee* (1816), 1 Wheaton 304, 334; *Cohens v. Virginia* (1821), 6 Wheaton 264; *Tarble's Case* (1871), 13 Wallace 397.

<sup>57</sup> *Tennessee v. Davis* (1880), 100 U. S. 257.

<sup>58</sup> By means of this writ the national government can force state authorities to release national agents from their custody.

Court of the United States, despite the resistance of the state, Chief Justice Taney said: "No State, judge or court after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or require him to be brought before them. And if the authority of the state in *form of judicial process or otherwise*, should attempt to control the marshal or other officer or agent of the United States, in any respect, in the custody of his prisoner, it would be his duty to resist it, and to call to his aid any force that might be necessary to maintain the authority of law against illegal interference."<sup>59</sup> Notwithstanding the sweeping character of this decision, state courts continued to discharge enlisted soldiers and sailors of the United States from the custody of their officers. This practice was not discontinued until 1871 when the Supreme Court, in a still more sweeping decision rendered by Justice Field, said that state courts had no right to issue a writ of *habeas corpus* for the release of any party in the custody of the United States if it appeared on the application of the writ that the party is considered "under the authority, or claim and color of the authority, of the United States, by an officer of that government. If such a fact appears upon the application, the writ should be refused."<sup>60</sup>

In addition to preventing interference by state agencies with the exercise of their powers, the national courts in recent years have repeatedly by writs of *habeas corpus* removed from state custody persons charged with offenses against the states. The Force Act of 1833 provided for the use of the writ "in all cases of a prisoner or prisoners in jail or confinement where he or they shall be committed or confined, on or by any authority or law for any act done, or permitted to be done, in pursuance of a law of the United States, or any orders, process or decree of any judge or court thereof."<sup>61</sup> The use of the writ was extended by the Act of 1842 to apply to a subject or citizens of a foreign state in custody of state authorities, claiming exemption under the commission or order or sanction of any foreign state, or under color thereof, the validity or effect of which is dependent upon the law of nations.<sup>62</sup> By the Act of 1867, the use of the writ was still further extended to apply "in all cases where any person may be

<sup>59</sup> *Ableman v. Booth* (1858), 21 Howard 506. See also *Texas v. White* (1869), 7 Wallace 700, and *Knox v. Lee* (1871), 12 Wallace 457.

<sup>60</sup> *United States v. Tarble* (1871), 13 Wallace 397.

<sup>61</sup> U. S. Statutes at Large, IV, Ch. 57, Sec. 4, 634.

<sup>62</sup> The Act of 1842 resulted from the case of *People v. McLeod* (1841), 1 Hill (N. Y.) 377.

restrained of his or her liberty in violation of the Constitution or any treaty or law of the United States."

Probably the most extreme use of this writ to assert national supremacy is found in the case of *In re Neagle*. The President appointed without statutory authority a deputy to accompany a Federal judge on his circuit to protect him against a threat that had been made against his life. In carrying out his duty, the deputy killed a citizen of California. The deputy was arrested by the authorities of this state and was brought before its courts for trial for murder. Federal authorities asked for his release by writ of *habeas corpus*, and objection was raised by the state of California to this use of the writ on the ground that Neagle was not "in custody for an act done or omitted in pursuance of a law of the United States." "In the view we take of the Constitution of the United States," said Justice Miller in rendering the majority opinion of the Supreme Court, "any obligation fairly and properly inferable from that instrument, or any duty of the Marshal to be derived from the general scope of his duties under the laws of the United States is a 'law' within the meaning of this phrase. It would be a great reproach to the system of government of the United States, declared to be within its sphere sovereign and supreme, if there is to be found within the domain of its powers no means of protecting the judges in the conscientious and faithful discharge of their duties, from the malice and hatred of those upon whom their judgments may operate unfavorably. . . . We do not believe that the government of the United States is thus inefficient, or that its Constitution and laws have left the high officers of the government so defenseless and unprotected."<sup>63</sup>

While it has been uniformly held by the Supreme Court that Congress has the right to extend the use of the writ to every situation in which the powers of the national government are involved, the doctrine also prevails that the writ should not issue except in imperative cases. It is assumed that the state courts will do justice to the litigant and will not disregard the settled principles of American constitutional law. It is preferred, therefore, in the interest of proper relations between national and state courts, that judicial process take its regular course and that such cases be brought to the Supreme Court by writ of error.<sup>64</sup>

5. *Independence of Federal Courts*. It is an established principle

<sup>63</sup> 135 U. S. 1.

<sup>64</sup> See *Ex parte Royall* (1886), 117 U. S. 241, and *Baker v. Grice* (1898), 169 U. S. 284.



of American jurisprudence that the Federal courts are free from interference by state courts in the exercise of their duties,<sup>65</sup> and can by a writ of injunction restrain orders forbidding proceedings in state courts. The states cannot place restrictions upon the right to remove cases to the national courts,<sup>66</sup> though they may withdraw a privilege which they have granted the litigant if the right of removal is exercised.<sup>67</sup>

6. *Judicial Review*. A principle somewhat akin to national supremacy, and sometimes called judicial supremacy, but possibly more accurately judicial review, is the practice of American courts to take jurisdiction of cases or controversies involving the constitutionality of legislative acts. The principle that a legislative act contrary to the law under which the legislative body is organized is null and void was constantly followed by the British Empire prior to the American Revolution. The acts of the colonial legislatures were expected to conform to their charters and the laws of England. The validity of such acts could be tested by an appeal to the King in Council from the decision of a colonial court. The legislative acts of the royal colonies, which were without charters, were submitted to the Crown for approval and might be disallowed. Legislative acts were disallowed from Virginia in 1677, from Rhode Island in 1704, from Connecticut in 1705, from North Carolina in 1747, from Pennsylvania in 1760, from New Hampshire in 1764, and from Massachusetts in 1772. The Crown exercised this authority through the Privy Council either as a board for review of colonial legislation or as a court to hear appeals from the decisions of colonial courts.<sup>68</sup>

The state courts following the Revolution continued this practice, holding that the state constitutions were the limits of the authority of the state legislatures. Prior to the Federal Convention, there arose at least five important cases in which the validity of legislative acts was considered.<sup>69</sup> In *Commonwealth v. Caton*, Chancellor

<sup>65</sup> *Weber v. Lee Co.* (1867), 6 Wallace 210; *U. S. v. Kockirk* (1867), 6 Wallace 514; *Supervisors v. Durant* (1869), 9 Wallace 415.

<sup>66</sup> *Home Insurance Co. v. Morse* (1874), 20 Wallace 445.

<sup>67</sup> See *Doyle v. Continental Insurance Co.* (1876), 94 U. S. 535, and *Security Mutual Life Insurance Co. v. Prewitt* (1906), 202 U. S. 246.

<sup>68</sup> Before the Revolution, 8563 acts of the colonial legislatures were reviewed by the Privy Council, of which 469 were disallowed.

<sup>69</sup> These cases were: *Holmes v. Walton*, New Jersey, 1780; *Commonwealth v. Caton*, Virginia, 1782; *Rutgers v. Waddington*, New York, 1784; *Trevett v. Weeden*, Rhode Island, 1786; and *Bayard v. Singleton*, North Carolina, 1787. For these cases, see Thayer, *Cases*, I, 55-83, and *Am. Hist. Rev.*, IV, 456.

Wythe pronounced the following dictum: "If the whole legislature, an event to be deprecated, should attempt to overleap the bounds prescribed to them by the people, I, in administering the public justice of the country, will meet the united powers at my seat in this tribunal; and pointing to the constitution, will say to them, here is the limit of your authority, and hither shall you go, but no further." In three of these cases, a legislative act was declared invalid, and, in two instances, with legislative acquiescence.<sup>70</sup> "By a slow and almost imperceptible development," says Haines, "the American doctrine of judicial supremacy had emerged through a long line of colonial and state precedents into a well defined principle of judicial practice. Referring on some occasions to an overruling law of nature, on other occasions to the fundamental principles embodied in the great English charters of liberties, and, finally, to formally enacted written instruments, colonial and state courts steadily asserted and maintained the right to invalidate acts, and thus they promulgated for the United States and put into an effective form Coke's theory of the supremacy of the courts. In practically every case where there was resistance to judicial decrees invalidating legislative acts the court's opinion and judgment were ultimately accepted and vindicated."<sup>71</sup>

It is clear from the records of the Federal Convention and those of the state ratifying conventions that it was expected that American courts would continue to exercise the powers of judicial review of legislative acts.<sup>72</sup> John Marshall, in discussing the limited character of the powers of the national government in the Virginia convention, said: "Has the government of the United States power to make laws on every subject? . . . Can they make laws affecting the mode of transferring property, or contracts, or claims between citizens of the state? Can they go beyond the delegated powers? If they were to make a law not warranted by any powers enumerated it would be considered by the judges as infringement of the Constitution which they are to guard. They would not consider such a law as coming under their jurisdiction. They would declare it void."<sup>73</sup> Patrick Henry, who was apprehensive that the

<sup>70</sup> The judgment of the court in the cases of *Holmes v. Walton* and *Bayard v. Singleton* was accepted by the legislatures of New Jersey and North Carolina, but the decision of the court in *Trevett v. Weeden* was resented by the legislature of Rhode Island.

<sup>71</sup> *Op. cit.*, 120.

<sup>72</sup> See Melvin, "The Judicial Bulwark of the Constitution", *Am. Pol. Sci. Rev.*, VIII, 167.

<sup>73</sup> Elliot's *Debates*, III, 553.

Federal courts were not sufficiently independent of the other departments, said: "I take it as the highest encomium of this country, that the acts of the legislature, if unconstitutional, are liable to be opposed by the judiciary."<sup>74</sup> "If the general legislature should at any time overleap their limits," said Ellsworth, "the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges, who, to secure their impartiality, are to be made independent, will declare it to be void. On the other hand, if the states go beyond their limits, if they make a law which is a usurpation upon the general government, the law is void; and upright, independent judges will declare it to be so."<sup>75</sup> "The interpretation of the laws," said Hamilton, "is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as a fundamental law. It must therefore belong to them to ascertain its meaning, as well as the meaning of any particular acts proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; in other words, the constitution ought to be preferred to the statutes, the intention of the people to the intention of their agents."<sup>76</sup>

It is thus seen that this doctrine had been a practice of the courts for more than a century before our present Constitution was written and that it was assumed by the framers of our Constitution that this practice would continue. Is there any constitutional basis for this doctrine or is it a mere convention of our unwritten constitution? Was there any deliberate effort in the Federal Convention to incorporate this doctrine in the Constitution? It was proposed in the convention to establish a Council of Revision to be composed of the executive and a convenient number of the national judiciary to pass on every legislative act of both Congress and the state legislatures before they became operative. It was pointed out by Gerry that this body would not be strictly judicial in character since it would pass on legislative policy, and that, therefore, judges should not be members of it; moreover, "they will have a sufficient check," said he, "against encroachments

<sup>74</sup> *Ibid.*, III, 325.

<sup>75</sup> *Ibid.*, II, 196. For similar statements by members of the ratifying conventions, see *Ibid.*, II, 151, 196, and 489; IV, 257.

<sup>76</sup> *The Federalist*, No. LXXVIII.

on their own department by their exposition of the laws, which involved a power of deciding on their constitutionality.”<sup>77</sup>

The constitutional basis for this power of the courts according to Willoughby rests upon the fact that the Federal courts have jurisdiction of “all cases arising under the Constitution which is declared to be the supreme law of the land.”<sup>78</sup> He thinks Marshall would have been on safer grounds if he had rested his arguments in *Marbury v. Madison*<sup>79</sup> on the jurisdiction of the Federal courts rather than on the theory of a written constitution.<sup>80</sup>

It should be pointed out that the courts exercise this power only in the consideration of cases or controversies in which they are compelled to enforce the Constitution as a paramount law. They do not sit to revise all legislation. The legislative and judicial departments are coördinate branches of our government and neither regards itself as a supervising agent of the other. The courts are really enforcing agents of the legislative will and it is only when this will is not expressed within constitutional limits that they are at liberty to declare this will null and void. The legislative body ceases to be the agent of the people and acts on its own initiative when its acts are contrary to the Constitution. Thus judicial review maintains the supremacy of the Constitution.

Since the exercise of this power is a delicate matter, the courts have adopted certain rules as a matter of propriety to govern their action in these important cases. (1) The bench must be full before such a decision is announced. (2) The main point in the case to be decided must require the invalidity of the statute in question to be declared. (3) A statute is assumed to be valid until some one whose rights are involved complains and calls on the courts to void the statute in behalf of his personal or property rights. (4) Nor will a statute be invalidated because of its oppressive provisions or supposed violation of some natural, social, or political rights of a citizen unless it can be shown that such injustice is prohibited or such rights are guaranteed by the Constitution. (5) A legislative act violating the principles of republican government is valid unless it can be shown that such principles are placed beyond legis-

<sup>77</sup> Farrand, *op. cit.*, I, 21.

<sup>78</sup> *Op. cit.*, I, 7, footnote 3.

<sup>79</sup> 1 Cranch 137.

<sup>80</sup> For the best discussions of the intentions of the framers of the Constitution, see C. A. Beard, *The Supreme Court and the Constitution* (1912), and J. Hampden Dougherty, *Power of Federal Judiciary over Legislation* (1912). For additional critical material on the origin and scope of the doctrine of judicial review, see 7 *Harvard Law Review*, 129; 33 *American Law Register*, 506; 28 *American Law Review*, 550, 847, and 856.



lative encroachments by the Constitution. (6) The courts will not invalidate a statute for violating the spirit of the Constitution. It must violate its terms expressed or implied. (7) A part of a statute will be declared void without nullifying the entire statute. A legislative act may be entirely valid as to some powers and unconstitutional in other respects.<sup>81</sup>

✓ 7. *Nature of Our Federalism.* Our Federal system has been styled the "true federal model."<sup>82</sup> The nature of our federalism determines the structure of the general government and the character of its relations with the state governments. The House of Representatives is a national body composed of representatives of approximately equal groups of population. The Senate is federal in structure since its membership is based on the equality of the states. The Executive is partly federal and partly national. He is elected by an electoral college composed of representatives of the states and of the people. The judges of the Federal courts secure their offices from the Executive and the Senate, and therefore, represent both federal and national agencies. Legislation being the result of consideration of both the Senate and the House of Representatives is the product of federalism and nationalism. Since the central government legislates for individuals or groups of individuals and not for states, and since it operates primarily on individuals in the administration of its laws, yet not exclusively so, particularly in its judicial functions, it is national in these respects. The central government is neither wholly federal nor national in either structure or operation, but partly federal and partly national in both structure and operation.

"But if the government be national with regard to the *operation* of its powers," said Madison, "it changes its aspects again when we contemplate it in relation to the *extent* of its powers. The idea of a national government involves in it, not only an authority over the individual citizens, but an indefinite supremacy over all persons and things, so far as they are objects of lawful government. Among a people consolidated into one nation, this supremacy is completely united in the national legislature. Among communities united for particular purposes, it is vested partly in the general and partly in the municipal legislatures. In the former case, all local authorities are subordinate to the supreme; and may be controlled, directed, or abolished by it at pleasure. In the latter,

<sup>81</sup> Cooley, *op. cit.*, I, 332-384.

<sup>82</sup> Lord Haldane in *Attorney General & C. v. Colonial Sugar Company* (1914), Appeal Cases, 237, 253.

the local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority, than the general authority is subjected to them, within its own sphere. In this relation, then, the proposed government cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several states a residuary and inviolable sovereignty over all other objects.”<sup>83</sup>

The matter of relations between the general government and the states is the most complex part of our system of government. The line of jurisdiction between the two is stated in the Constitution in a general way, but it has been the subject of controversy since the beginning of the operation of the system and in the nature of things will remain a subject of contention as long as our federalism survives. This line of jurisdiction is fixed by rather complex system of distribution of powers. The principle governing this distribution is that “The powers not *delegated* to the United States by the Constitution, nor prohibited by it to the states are reserved to the states respectively or to the people.”<sup>84</sup> The Constitution of the United States does essentially two things: (1) it provides for the organization of the general government, leaving it to the people of the individual states to organize their state governments in such fashion as they see fit save that they shall be republican in form; and (2) it sets the demarcation of authority between the general and state authorities.

The general government has *delegated* powers expressed or implied. This means that the Constitution of the United States endows the general government with the powers that it may exercise. These powers fall into two classes: (1) those which the national government alone may exercise, these being prohibited to the states, and (2) those which the states may exercise in coöperation with the national government or by themselves in default of their employment by the general government. In case of conflict between the nation and the states in the exercise of these concurrent powers, the general government enjoys supremacy which is determined in final analysis by the Supreme Court of the United States. “The Constitution,” said Justice Johnson, “containing a grant of powers in many instances similar to those already existing in the state governments, and some of those being of vital importance also to state authority and state legislation, it is not

<sup>83</sup> *The Federalist*, No. XXXIX.

<sup>84</sup> *The Constitution*, Art. X.

to be admitted that the mere grant of such powers in affirmative terms to Congress does, *per se*, transfer an exclusive sovereignty on such subjects to the latter. On the contrary, a reasonable interpretation of that instrument necessarily leads to the conclusion that the powers so granted are never exclusive of similar powers existing in the States, (1) *unless where the Constitution has expressly, in terms, given an exclusive power to Congress, or* (2) *the exercise of a like power is prohibited to the states, or* (3) *there is a direct repugnancy or incompatibility in the exercise of it by the states.* The example of the first class is to be found in the exclusive legislation delegated to Congress over places purchased by the consent of the legislature of the state in which the same shall be, for ports, arsenals, dockyards, etc.; of the second class, the prohibition of a state to coin money or emit bills of credit; of the third class, as this court have held, the power to establish a uniform rule of naturalization (*Chirac v. Chirac*, 2 Wh. 259; 4 L. ed. 234) and the delegation of admiralty and maritime jurisdiction (*Martin v. Hunter*, 1 Wh. 304; 4 L. ed. 97).<sup>85</sup>

The above rule is now generally accepted as the principle by which it may be determined whether any power granted to the general government is exclusive in its nature. "In all other cases not falling within the classes already mentioned," said the same authority, "it seems unquestionable that the states retain concurrent authority with Congress, not only upon the letter and spirit of the Eleventh [Tenth?] Amendment of the Constitution, but upon the soundest principles of general reasoning."<sup>85</sup> For instance, the grant to Congress of commercial power does not exclude the states from exercising an authority over its subject matter.<sup>86</sup> They may legislate on such matters as pilotage, wharves, and harbors, which are not strictly national in character, and, therefore, do not require uniformity in their regulation.<sup>87</sup> When, however, Congress sees fit to assume control of such matters, state regulation ceases. In fact the recent holdings of the Supreme Court have given the general government control of the *incidentals* to the exercise of commercial powers even though they are matters over which the states have jurisdiction.<sup>88</sup>

In interpreting the powers of the general government granted

<sup>85</sup> *Houston v. Moore* (1820), 5 Wheaton 1.

<sup>86</sup> *Cooley v. Board of Wardens* (1852), 12 Howard 299.

<sup>87</sup> *Cardwell v. American River Bridge Co.* (1885), 113 U. S. 205.

<sup>88</sup> See *Minnesota Rate Cases* (1912), 230 U. S. 352; *Shreveport Case* (1913), 234 U. S. 342; and *Wisconsin v. C. B. & Q. Ry. Co.* (1922), 257 U. S. 563.

by the Constitution, two theories have been advanced: (1) the strict construction theory and (2) the liberal or loose interpretation. These theories are based on totally different conceptions of our system of government. If the Union is one of sovereign states and the Constitution is a compact or treaty between the states, then the general government is the agent of the states and its powers should be strictly construed. If, however, the general government is the agent of the people of the United States in their national character and was intended to be a government for the nation for all national purposes, both domestic and foreign, then the Constitution is not a compact but a fundamental law and the powers of the general government should be so interpreted as to make it an adequate government for the nation. This question was settled by the Supreme Court during the first few years of the operation of the government, whether historically correct it is useless to say, when it definitely stated the doctrine that neither the express nor the implied powers of the general government, the latter being as completely granted and as sovereign in their nature as the former, could be denied their logical and natural import and that the general government is a government of the people and not of the states.<sup>89</sup> In possibly the greatest case that has ever come before the Supreme Court, Marshall said: "We must never forget, that it is a *Constitution* we are interpreting."<sup>90</sup>

The liberal construction theory of the powers of the general government advocated by the Federalists and upheld by Marshall has become the dominating one. It rests primarily on the implied power clause of the Constitution which says that Congress shall have the power "to make all *laws* which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the Government of the

<sup>89</sup> In *Gibbons v. Ogden* (1824), 9 Wheaton 1, Chief Justice Marshall, referring to the Constitution, said: "This instrument contains an enumeration of powers expressly granted by the people to their government. It has been said that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the Constitution which gives countenance to this rule? In the last of the enumerated powers, that which grants, expressly, the means of carrying all others into execution, Congress is authorized to "make all laws which shall be necessary and proper" for the purpose. But this limitation on the means which may be used, is not extended to the powers which are conferred: nor is there one sentence in the Constitution which has been pointed out by the gentlemen of the bar, or which we have been able to discern, that prescribes this rule. We do not therefore think ourselves justified in adopting it."

<sup>90</sup> *McCulloch v. Maryland* (1819), 4 Wheaton 316.



United States, or in any department or officer thereof.”<sup>91</sup> The Supreme Court has held that the words necessary and proper do not mean *absolutely* necessary but merely *convenient* or *useful*.<sup>92</sup>

The theory as it is now generally understood and accepted makes the United States a fully sovereign national state with reference to its own citizens and its constituent member states and, with reference to foreign states, a political power endowed with all the authority possessed by other national states. In support of this contention it has been held that the government of the United States has “resulting powers,” which are neither expressed nor implied but deducible from a group of powers. “It is to be observed,” said Marshall, “that it is not indispensable to the existence of every power claimed for the Federal Government that it can be found specified in the words of the Constitution, as clearly and directly traceable to some one of the specified powers. Its existence may be deduced fairly from more than one of the substantive powers expressly defined, or from them all combined. It is allowable to group together any number of them and to infer from them all that the power claimed has been conferred . . . and it is of importance to observe that Congress has often exercised, without question, powers that are not expressly given nor ancillary to any single enumerated power.”<sup>93</sup>

It may be summarized then that while the general government has only enumerated and delegated powers, they are sovereign in their nature and are to be liberally construed. They are national in their scope, supreme in authority in so far as they relate to citizens or states, except when expressly limited by constitutional provisions, and plenary in international affairs. They may be divided into (1) express, (2) implied, and (3) resulting.<sup>94</sup> It has

<sup>91</sup> *The Constitution*, Art I, Sec. 8, Cl. 18.

<sup>92</sup> *United States v. Fisher* (1804), 2 Cranch 358, and *McCulloch v. Maryland* (1819), 4 Wheaton 316.

<sup>93</sup> *Cohens v. Virginia* (1821), 6 Wheaton 264.

<sup>94</sup> For the last quarter of a century or more, the contention has been made that the government of the United States has “inherent” powers. This is a radically different doctrine from that of implied or resultant powers, and is wholly inconsistent with the theory of delegated powers. It smacks of the English doctrine of parliamentary sovereignty and is really subversive of the Constitution. In advocacy of this theory see speech of Senator Platt, December 19, 1898, *Congressional Record*, XXXII, No. II, 321-3 and speech made by Senator Foraker in the Senate July 1, 1898. The Supreme Court in several cases has given some support to this doctrine in dicta. See *Legal Tender Cases* (1871), 12 Wallace 457; *United States v. Jones* (1883), 109 U. S. 513; *Church of Jesus Christ v. United States* (1890), 136 U. S. 1; *Fong Yue Ting v. United States* (1893), 149 U. S. 698. For an opposing view, see Willoughby, *op. cit.*, I, 66-69.

also been pointed out that some of these powers were not exclusively granted to the national government. They are *concurrent* powers and are exercised by both the states and the nation. For examples we may cite the power of taxation, control of electors, and the regulation of the liquor traffic under the Eighteenth Amendment.

While the general government has *granted* powers, the states have *reserved* powers. If a power is not granted to the general government, not denied the states, and not reserved to the people, it belongs to the states, not by a grant in the Constitution but by the principle of *inherent* powers. The powers of the state governments are limited by (1) the grant of exclusive powers to the general government; (2) the powers denied them in the Constitution of the United States; (3) the powers reserved to the people; and (4) the limitations in the state constitutions. The reserved powers of the states are, therefore, not stated in either the Constitution of the United States or the state constitutions. They are those powers that states generally exercise except those found in the above limitations, and relate to such matters as education, health, morals, agriculture, civil and criminal law, business, roads, intrastate commerce, and family relations.

The Constitution denies certain powers to both the national and state authorities. They are prohibited from passing a bill of attainder or an *ex post facto* law or from depriving any person of life, liberty, or property without due process of law. These are mere examples illustrative of this principle, the complete list of which may be found in Article I, Sections 9 and 10 of the Constitution, and in its Amendments.

The powers reserved to the people are those which might be exercised by the states without violation of the Constitution of the United States, but which are denied the state governments by their respective state constitutions. There is, therefore, no uniform set of powers that can be listed in this group. They must be found in the state constitutions, and, of course, vary from state to state. They are those which the people of the individual states reserve to themselves. This illustrates a fundamental difference between the national and state constitutions. The former grants powers to the general government which it would otherwise not possess while the latter deny powers to the state governments which they would otherwise have.

8. *The Guarantees of Private Rights.* While the Constitution protects private rights against both the national government and

the states, only the limitations on the former will be considered in this connection. These fall into two classes: (1) those relating to personal rights and (2) those pertaining to property rights. In relation to these rights the Constitution is intensely human.

(1) Of the first group, the right to life is the most important. Life cannot be taken in times of peace without due process of law.<sup>95</sup> Life has been construed to include not merely existence but also the possession of the limbs and organs for its exercise.<sup>96</sup> Due process means one thing in judicial matters, another in legislative affairs, and a third in administrative proceedings. It cannot be defined so as to cover all cases, but whatever its requirements are under any situation, they are limitations against the government in favor of the individual. In general, due process in judicial matters requires the court to have jurisdiction, speedy and public trial by a common law jury in capital cases, privilege of counsel, due notice, opportunity to present evidence—in short, the fundamental rights of litigants to a fair trial. Bills of attainder are forbidden because they inflict punishment without due process. They are acts of legislatures, attempting to exercise judicial powers. Treason, for which a person cannot be indicted except on the testimony of two witnesses, is defined in the Constitution. The effect of impeachment is limited to removal from office. An *ex post facto* law, making an act criminal which was innocent at the time of its committal, or increasing the penalty of an act which was already criminal, or decreasing the evidence required for conviction, is forbidden by the Constitution.<sup>97</sup>

The right not to be imprisoned or detained arbitrarily is protected by the writ of *habeas corpus* which may be suspended only in time of war. This writ must be granted immediately night or day, and the authority restraining the individual must produce him in open court and release him unless it can be shown satisfactorily to the court that he is indicted or reasonably charged for an offense for which he is unable to offer bail.

The individual has freedom of movement. He has the right to go where he pleases, live where he will, leave the country, and, if

<sup>95</sup> Martial law, which is unknown to the Constitution, and therefore no law at all, is frequently declared in territory occupied by an enemy or where the ordinary courts are closed. Really no officer, civil or military, has the power to declare it. It is purely arbitrary government. Of course, military law is a very different thing.

<sup>96</sup> *Munn v. Illinois* (1877), 94 U. S. 113.

<sup>97</sup> *Calder v. Bull* (1798), 3 Dallas 386; *Ex parte Garland* (1866), 4 Wallace 333; *Kring v. Missouri* (1883), 107 U. S. 221.

a citizen, to return. He can expatriate himself if he likes.<sup>98</sup> In other words, he can be the architect of his own destiny.

Personal liberty includes the right to labor at any trade, to follow any business, and to make contracts. No individual can be restrained by any person, combination, or the government in the exercise of his faculties in any manner whatsoever. In recent years, freedom of contract or liberty of trade has become one of the most important constitutional guarantees of civil liberty.<sup>99</sup> Of course, the government may impose restrictions in the interest of public morals, health, or safety.

Freedom of religion, speech, and the press is beyond the power of Congress to abridge. Congress cannot establish a state religion or interfere with freedom of worship. No one, however, in the name of religion can violate a criminal statute.<sup>100</sup> Freedom of speech or the press was intended to prevent government censorship of free discussion and criticism of the acts of officials or policies of the government. "The liberty of the press consists, in my idea, in publishing the truth, from good motives and for justifiable ends," said Hamilton, "though it reflects upon government, or magistrates, or individuals. If it be not allowed, it excludes the privilege of canvassing men, and our rulers."<sup>101</sup> Freedom of speech and the press certainly requires that no previous restraints should be laid upon the expression of opinion, but it does not free an individual from the consequences of his opinion.

Freedom of assembly and the right to petition are additional guarantees of inestimable value in a democratic society. This right, however, like most of the others, can be exercised only so long as its purpose is not antagonistic to the government. An assembly to discuss ways and means of overthrowing the government would not fall within the legitimate scope of this right.

An entirely erroneous conception of our civil liberty would be given if the impression were made that the constitutional theory of these rights constitutes the basis of government practice. In the first place, there is no such thing as an absolute right against a sovereign state. As long as the theory of the sovereign state prevails, so-called rights become privileges in practice. In the second place, the government itself is the interpreter of what these rights

<sup>98</sup> *Crandall v. Nevada* (1867), 6 Wallace 35. A person expatriates himself by renouncing the citizenship of his native country without becoming a citizen of another country.

<sup>99</sup> *Smith v. Texas* (1914), 233 U. S. 630.

<sup>100</sup> *Reynolds v. United States* (1878), 99 U. S. 145.

<sup>101</sup> *Works* of Alexander Hamilton, VII, 339.



mean. The government and the individuals do not always agree in their interpretation. In the third place, the rights of individuals must be a very relative thing, and are becoming increasingly inconsistent with the interests of society. They represent some of the relics of natural law which was the Magna Carta of individualism of the eighteenth century and which appealed to men everywhere, and particularly to a frontier society that had just won its spurs. A society of almost an exactly opposite type chained together by innumerable interdependent relations cannot live under such a philosophy.

This is by no means to deprecate the value of these rights as checks against an insurgent collectivism however strong or weak they may be, but merely to indicate a situation of fact that is stronger than constitutional phraseology. Indeed, it is the amending agent of the Constitution, or the promulgator of the unwritten constitution. Furthermore, this is not to justify the attitude that our government has taken toward these rights in all instances. It is not a blanket approval of the Sedition Act of 1798, or the Civil War practices of the government, or the Espionage Act of 1917, or the senatorial red-penciling of college professors, or the converting of the American press into an agent of governmental propaganda in times of war or peace. When the press can do no more than repeat the colorless remarks of an unofficial spokesman of the White House, who, everybody knows, is the President of the United States, it has ceased to be a creative agent of democratic government.<sup>102</sup>

(2) Property rights which under the Constitution exclude only man from their scope are particularly protected against the government's powers of taxation and eminent domain, more possibly as to the method of their exercise than as to their extent. Except in the territories and under the above constitutional limitation, the states alone can say what constitutes property. This is more of a theoretical than an actual limitation. The Constitution requires that all revenue bills shall originate in the House of Representatives. While this procedure is not strictly followed, it is mainly a

<sup>102</sup> For a discussion of these problems of popular government, see James D. Randall, *Constitutional Problems Under Lincoln* (1926), 74-169; Z. Chafee, *Freedom of Speech* (1920), 64 ff.; Tully Nettleton, "The Philosophy of Justice Holmes on Freedom of Speech," *Southwestern Political Science Quarterly*, III, 287 ff.; Burgess, *op. cit.*, I, 184-195; *United States v. The Insurgents* (1795), 2 Dallas 335; *Bigelow v. Forest* (1869), 9 Wallace 339; *Boom Co. v. Patterson* (1878), 98 U. S. 403; and *United States v. Jones* (1883), 109 U. S. 513.

limitation on the method of levying taxes and not on their character or amount.<sup>103</sup> It was, however, intended to act as a real limitation on the theory that the representative branch of Congress would guard the property rights of its constituents. No money can be drawn from the treasury except for the purpose for which it is appropriated. The executive department, which is the spending agency of the government, is, therefore, limited by law in its use of public funds.

There are, however, still more specific limitations on the power of taxation of the national government. Direct taxes can only be levied in proportion to the "census or enumeration", required by the Constitution. Direct taxes include a capitation or poll-tax, land tax,<sup>104</sup> and income taxes.<sup>105</sup> The Sixteenth Amendment removed the above limitation from income taxes. Indirect taxes must be levied with geographical uniformity. Congress cannot tax exports from the states.

The Fifth Amendment prohibits Congress from taking private property except for a public purpose and then with just compensation. All kinds of property are subject to the power of eminent domain, which the national government can exercise when it is "necessary and proper" to the exercise of its powers.<sup>106</sup> It may be exercised to obtain sites for public buildings, right of ways for post roads, for the construction of highways, for interstate commerce, and for the establishment of national parks and memorials. If a private property right is subject to a public right such as the ownership of the bed of a navigable river which is necessary for navigation or interstate traffic, congressional regulation, although it may interfere with such right, is not a violation of due process and no compensation is necessary.<sup>107</sup>

In the exercise of the powers of taxation and eminent domain, the government is restricted to due process. Since Congress supposedly levies taxes only for a public purpose, the courts have not been inclined to question its appropriations. Congress is authorized to levy taxes "to pay the debts and provide for the common defense and general welfare of the United States."<sup>108</sup> In con-

<sup>103</sup> The Senate frequently so amends the revenue bills of the House as to amount to their control.

<sup>104</sup> *Hylton v. United States* (1796), 3 Dallas 171.

<sup>105</sup> *Pollock v. Farmers' Loan & Trust Co.* (1895), 157 U. S. 429; *Nicol v. Ames* (1899), 173 U. S. 509; *Patton v. Brady* (1902), 184 U. S. 608; *Spreckles Sugar Refining Co. v. McClain* (1904), 192 U. S. 397.

<sup>106</sup> *Kohl v. United States* (1875), 91 U. S. 367.

<sup>107</sup> *United States v. Chandler-Dunbar W.P. Co.* (1913), 229 U. S. 53, 62.

<sup>108</sup> *The Constitution*, Art. I, Sec. 8.

demnation proceedings, however, notice and an opportunity to be heard are required by due process.<sup>109</sup> Due process applies not merely to the making of laws, but also to judicial decisions, and administrative actions of the government in the exercise of the power of eminent domain. Due process also applies to contract rights, and is, therefore, a broader limitation upon the national government than the prohibition upon the states not to pass any law impairing the obligation of contracts.

9. *Interstate Relations.* A considerable amount of private international law and comity among independent states was incorporated in the Constitution and thus became constitutional law as the basis of the relations of the states in the Union with one another. In these matters, state lines, while they still mark the limitations of separate jurisdiction, were made relatively insignificant and cause practically no change in the rights and privileges of American citizens who pass from state to state. Freedom of intercourse was tremendously facilitated by this arrangement.

The power of Congress over interstate commerce and postal matters guarantees freedom of interstate travel and communication. This is further strengthened by the constitutional provision that the citizens of each state are entitled to all the privileges and immunities of citizens of the several states. Without attempting to define state citizenship in this connection, which, of course, is involved as a prerequisite to the enjoyment of the above guarantee, it is sufficient to say that a citizen of a state is a citizen of the United States with his legal residence in the state. Under this condition, the above provision would mean that a citizen of New York, on going to Pennsylvania, would be entitled to the privileges of Pennsylvania citizens when he satisfies the requirements that Pennsylvania makes of her own citizens. For instance he could not vote or hold office in Pennsylvania until he satisfied the requirements exacted of her own citizens in these matters. But the moment that he arrived in Pennsylvania, he would have access to her courts, and could marry, buy real estate, inherit property, or engage in business without discriminations against him as a non-resident. In general, the fundamental rights of life, liberty, and property are to be enjoyed in any state on the same basis by both residents and non-residents.

In legal matters which effect both social and business affairs the Constitution provides that "Full faith and credit shall be given, in each state, to the public acts, records and judicial proceedings of

<sup>109</sup> *United States v. Jones* (1883), 109 U. S. 513, 519.

every other state.”<sup>110</sup> Congress has fixed the form of authentication of such acts and proceedings and has declared that when they are so authenticated they shall have the same validity in every court within the United States as they have in the state of their origin. Public acts refer to the ordinances and statutes in force in a state, and records include acts of administrative officials as well as those of the legislature and the courts. This does not mean that the laws or judicial decisions of one state have the effect of law in another, but rather that they shall be regarded as valid evidence.<sup>111</sup> For instance, a title to land in Michigan will be recognized in any other state. The judicial decisions of a state are recognized in other states only in civil matters because their criminal laws differ in many instances. When there is lack of harmony, full faith and credit could not be given without subjecting one state to the authority of another. Sometimes these relations operate on a basis of comity<sup>112</sup> or courtesy rather than in accordance with constitutional law. The details of these relations cannot be given here, and about the only way to dismiss the subject is to say that they constitute that abstruse and fascinating subject of “conflict of laws” on which lawyers delight to whet their wits without particularly adding to the clarification of the subject.<sup>113</sup>

The constitutional provision for the return of fugitives from justice is another instance of incorporating international practice into our constitutional law. The constitution says such persons “shall” on the demand of the executive authority of the state from which they fled be returned. Congress has provided that governors shall honor one another’s requests in this matter, but as a matter of practice they consider this a moral rather than a legal obligation.

A governor cannot be mandamusd in this matter. It is a case in which a constitutional “shall” has become a “may” in practice. “It was evidently contemplated,” says Evans, “that the ‘right of asylum,’ the source of so many international controversies, should not exist as between the States of the Union, but as the provision is not self-executing, since it does not specify the authority upon whom the demand is to be made nor the form of the demand nor the manner of recovering the fugitives, and as Congress has never enacted adequate legislation for its execution, a fugitive’s quest

<sup>110</sup> Art. IV, Sec. 1.

<sup>111</sup> *Thompson v. Whitman* (1873), 18 Wallace 457, 463.

<sup>112</sup> *Aetna Life Ins. Co. v. Tremblay* (1912), 223 U. S. 185.

<sup>113</sup> See Charles K. Burdick, *The Law of the American Constitution* (1922), 475-482.



for a friendly governor who will refuse to surrender him, as in the case of the persons charged with the murder of Governor Goebel of Kentucky, is not an unknown spectacle.”<sup>114</sup> The Supreme Court has held that “the performance of the duty, however, is left to depend on the fidelity of the State Executive to the compact entered into with the other States when it adopted the Constitution of the United States, and became a member of the Union.”<sup>115</sup>

A governor when a demand is made upon him for the return of a fugitive has a right to require that proof of the presence of the fugitive in the demanding state at the time of the commission of the alleged offense be given,<sup>116</sup> that it be shown that the accused is actually a refugee from justice of such a state,<sup>117</sup> and that he is charged with a crime committed against the laws of the state demanding his return.<sup>118</sup> After securing such information, he may then use his discretion. For the most part, however, it should be said that the governors have rather conscientiously performed their duty in the return of fugitives.

The states do not participate in the matter of international extradition of fugitives from justice. This matter is regulated by treaties between independent nations, and, is, therefore, exclusively in the jurisdiction of the government of the United States. The great purpose of the constitutional provision for the return of fugitives from justice was to make the Union a more efficient agent in establishing justice and securing domestic tranquillity. If the states fail to coöperate in this high purpose, one of the most important objects of the Union is defeated, and the prompt and efficient administration of their criminal laws is impossible.<sup>119</sup>

<sup>114</sup> *Leading Cases on American Constitutional Law* (1925), 47-48.

<sup>115</sup> *Kentucky v. Dennison* (1860), 24 Howard 66.

<sup>116</sup> *Hyatt v. Corkran* (1903), 188 U. S. 691.

<sup>117</sup> *Ex parte Reggel* (1885), 116 U. S. 80.

<sup>118</sup> *Roberts v. Reilly* (1885), 116 U. S. 80.

<sup>119</sup> See Burdick, *op. cit.*, 487-493.

## CHAPTER VII

### THE DEVELOPMENT OF THE CONSTITUTION

All constitutions are in a state of constant flux. This may be called the law of constitutional development enacted by the exigencies of national life. "The underlying understandings of a constitutional system," said Woodrow Wilson, "are modified from age to age by changes of life and circumstances and corresponding alterations of opinion. It does not remain fixed in any unchanging form, but grows with the growth and is altered with the change of the nation's need and purposes."<sup>1</sup>

In this process of growth, all constitutions sooner or later come to contain two elements: a formal, written or legal part which is enforceable in the courts and an informal, unwritten<sup>2</sup> or extra-legal part which is created by usage and sanctioned by public opinion, the life-giving blood of all constitutional systems. Both of these elements are equally fundamental to all constitutions, but the unwritten element in the course of time frequently comes to play the larger part in the practical workings of constitutional systems.

These elements are developed by different processes. The written constitutions of Great Britain and Italy are the acts of their parliaments and may, therefore, be changed by them at will while those of France and Germany are the acts of national assemblies composed of the two houses of their parliaments and, of course, are amended by the same process. There is not much difference between these two processes. In Great Britain and Italy, the parliaments exercise constituent powers while in France and Germany they change their form and procedure, call themselves a national assembly, and do the same thing. The personnel of the national assemblies in France and Germany is the same as that of their parliaments. The difference is primarily the inconvenience to the French and German parliaments involved in converting themselves into national

<sup>1</sup> *Constitutional Government in the United States* (1908), 22.

<sup>2</sup> "Unwritten" is used here to include not merely judicial usage or precedent but also legislative, executive, administrative, or political practices.

assemblies. The combining of the two houses in a single assembly and voting as individuals give the balance of power to the lower houses in the amending process, but this is also true of the legislative process. There is, of course, the difference that an act of the national assembly in Germany or France is a fundamental law, but a legislative act of the English Parliament dealing with constitutional matters is also regarded as of superior sanctity.

## I. THE WRITTEN CONSTITUTION

In the United States, the written constitution has developed by a different process. The Constitution provides that "Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first Article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate."<sup>3</sup> There are here outlined four regular methods by which an amendment may be made: (1) proposal by two-thirds of Congress and ratification by the legislatures of three-fourths of the states; (2) proposals by two-thirds of Congress and ratification by conventions in three-fourths of the states; (3) proposal by a national convention and ratification by the legislatures of three-fourths of the states; (4) proposal by a national convention and ratification by conventions in three-fourths of the states.

It should be noticed, however, that there is one subject matter to which the amendment process applies for which the above methods of ratification cannot be used: this is "that no State, without its own consent, shall be deprived of its equal suffrage in the Senate." It is obvious from this language that ratification of an amendment proposing a change in the equality of the suffrage of the states in the Senate would require the unanimous consent of the states, which could be given by either legislatures or con-

<sup>3</sup> *The Constitution*, Art. V.

ventions. Hence, there are four methods of amendment applicable to this particular subject: two methods of proposal—by Congress and or by a national convention, and two methods of ratification for each proposal—by legislatures of all the states or by conventions in all the states. There may be said to be, therefore, eight possible methods of amending the Constitution, varying with the subject matters, methods of proposal, and ratification.<sup>4</sup>

Congress, by a two-thirds vote in each house, proposes an amendment by means of a joint resolution which does not require the President's signature since amending the Constitution is not a legislative matter. Moreover, the passage of such a resolution by a two-thirds majority in the first instance eliminates the usual effect of a veto.<sup>5</sup> Two-thirds of each house has been construed to mean two-thirds of the quorum of each house.<sup>6</sup> The Constitution provides that a majority of each House shall constitute a quorum to do business."<sup>7</sup> While Congress cannot withdraw the proposal of an amendment after it has been submitted to the states, it has been recently decided that ratification must take place in a reasonable time,<sup>8</sup> otherwise an amendment might be resurrected and ratified fifty or a hundred years after its proposal. An amendment may provide a time limit on its ratification or fix the date when it shall become operative after ratification. Ratification has been construed to be the act of the state legislature or convention and not of the people by referendum, and since the proposing of an amendment is not a legislative act, ratification is not, and governors cannot participate in ratification. Ratification is irrevocable. States may refuse to ratify and later ratify, but they cannot ratify and then revoke their action.<sup>9</sup> An amendment becomes operative as soon as the last required state has ratified.

Nineteen amendments have been added to the Constitution since its adoption. Proposal by Congress and ratification by the legislatures has been the process used in every instance. Since the Constitution was ratified by conventions, it would seem more logical and more in harmony with the spirit of that instrument for amend-

<sup>4</sup> An amendment reducing or increasing the suffrage of the states in the Senate but maintaining the principle of equality could be made by the regular process.

<sup>5</sup> See J. Franklin Jameson, *Constitutional Conventions* (Fourth Ed.), 586-592; *Hollingsworth v. Virginia* (1798), 3 Dallas 378, 381; and *Hawke v. Smith* (1920), 253 U. S. 221, 229.

<sup>6</sup> *The Prohibition Cases* (1920), 253 U. S. 350, 386.

<sup>7</sup> *The Constitution*, Art. I, Sec. 5.

<sup>8</sup> *Dillon v. Gloss* (1921), 256 U. S. 368.

<sup>9</sup> Jameson, *op. cit.*, 624-626.



ments to be ratified in the same way. State legislatures do not generally exercise constituent powers in state affairs.<sup>10</sup> Why, since the general government is as much a government of the people as state governments are, should state legislatures exercise constituent powers in national matters? Also, why should not proposals for amendments be made by a national convention rather than by Congress since the Constitution was proposed by a national convention? The framers of the Constitution recognized the exercise of constituent powers by legislative bodies as a dangerous and an unsound practice.<sup>11</sup>

The first ten amendments, which are generally regarded as the Federal Bill of Rights, were added to the Constitution by 1791. There was a sort of a gentleman's agreement during the period of ratification of the Constitution that certain amendments would be offered and supported as a means of inducing some of the states to ratify the Constitution since ratification was held to be unconditional and irrevocable. Randolph and Gerry had advocated a Bill of Rights in the Federal Convention and the holding of a second convention to propose amendments to the Constitution.<sup>12</sup> Madison who was elected to membership in the first House of Representatives on a pledge to support amendments accordingly proposed seventeen amendments June 8, 1789, twelve of which were accepted by Congress and presented to the states September 25, 1789. Ten of these were ratified by the necessary three-fourths of the states by December 15, 1791. The first eight provide guarantees for personal and property rights; the ninth provides that the enumeration of certain rights of the people in the Constitution is not to be construed to deny or disparage others retained by them; and the tenth announces the theory of the distribution of powers known as the doctrine of reserved powers. The first ten amendments operate as a limitation upon the general government.

The eleventh amendment adopted in 1798 excludes from the jurisdiction of the Federal Courts a suit against a state commenced by a citizen of another state or by a subject or citizen of a foreign state. It has been interpreted to prohibit also a state from being sued by one of its own citizens in a Federal Court.<sup>13</sup> This amend-

<sup>10</sup> In Delaware, the state legislature may amend the state constitution by passing an amendment in two successive sessions.

<sup>11</sup> Madison said, "it would be a novel and dangerous doctrine that a Legislature could change the Constitution under which it held its existence." Hunt and Scott, *Debates in the Federal Convention of 1787*, 308.

<sup>12</sup> Hunt and Scott, *op. cit.*, 541, 544, 557, 574, 575.

<sup>13</sup> *Hans v. Louisiana* (1890), 134 U. S. 1.

ment was the direct result of the reaction of the states against the decision of the Supreme Court holding that a private citizen could sue a sovereign state.<sup>14</sup> The twelfth amendment added in 1804 changed the method of electing the President and Vice-President, providing that the electors shall cast separate ballots for these officers. This change was made necessary by the development of the party system, which, according to the original method of electing these officers, made it possible to have a President and Vice-President of different politics. The old machinery had actually broken down in the presidential election of 1800 in which a tie resulted between Jefferson and Burr and the election went to the House of Representatives.

To accomplish a social and political revolution which it was thought the results of the Civil War required, the thirteenth (1865), fourteenth (1866), and fifteenth (1870) amendments were added to the Constitution. The first abolished slavery throughout the jurisdiction of the United States; the second defines American citizenship and seeks to protect its rights; the third prevents the denial or abridgement of the suffrage to male citizens on account of race, color, or previous condition of servitude. It did not grant the suffrage to the freedmen as is frequently asserted. It only forbids a discrimination in the above respects, leaving the granting of the suffrage and otherwise restricting it to the states. These amendments set into operation certain forces which have had and are having far reaching influences on our federalism. Their adoption marked the first time in our history that our Constitution was used as a means of enacting a social code. This process has now become the favorite method by which any American may lift his neighbor to his own high level. The clause of the fourteenth amendment, "nor shall any State deprive any person of life, liberty, or property, without due process of law", undoubtedly intended to protect the freedmen, has been construed to include corporations as juristic persons, and as a result almost the entire social legislation of the states has been made subject to review by the Federal Courts. It greatly increased the authority of the Federal Courts over the action of the states.<sup>15</sup>

In 1895, the Supreme Court held that Congress could not levy a general income tax because it was a direct tax and, therefore,

<sup>14</sup> *Chisholm v. Georgia* (1793), 2 Dallas 419.

<sup>15</sup> By 1911, the Supreme Court had decided 604 cases involving this amendment, of which only 28 related to the rights of Negroes as such. Cushman's *Leading Constitutional Decisions* (1925), 34.

could be levied only in proportion to population.<sup>16</sup> The result was that the sixteenth amendment was added to the Constitution in 1913, giving Congress power to levy an income tax without regard to population. In the same year the seventeenth amendment was passed, requiring the Senators of the United States to be elected by popular vote. In 1919 the eighteenth amendment, prohibiting "the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes," and giving Congress and the states concurrent power to enforce it, was added. Lastly in 1920 the nineteenth amendment, granting women the suffrage on equal terms with men, became a part of the Constitution.

## II. THE UNWRITTEN CONSTITUTION

The amendments to the written Constitution constitute only a small part of our constitutional development since 1789. "Every general term of the Constitution", said Woodrow Wilson, "has come to have a meaning as varied as the actual variety of the things which the country now shares in common."<sup>17</sup> "The most important phases of national growth," says an eminent authority, "are not reflected in formal amendments to the Constitution."<sup>18</sup> In fact, it is evident that our governmental system would have proved very inadequate if it had been kept within the strait-jacket of the written Constitution. The development of a very comprehensive unwritten constitution to provide a *modus operandi* for the government is not only the most significant contribution to our constitutional development, but undoubtedly a major reason for the success of our political institutions. The unwritten constitution has been developed by several processes:

1. *By Legislation.* Every agent of the government that is concerned in the making or administration of law must place an interpretation on words and phrases of the Constitution. The great body of interpreted law, consisting of ordinances of the President, acts of Congress, and decisions of the Supreme Court, which must be consulted to discover what the written Constitution means, in

<sup>16</sup> *Pollock v. Farmers' Loan and Trust Co.* (1895), 157 U. S. 586.

<sup>17</sup> *Op. cit.*, 193.

<sup>18</sup> Charles A. Beard, *American Government and Politics* (Fifth Ed., 1928), 94.

reality is the largest part of the unwritten constitution.<sup>19</sup> These precedents play an indispensable part in our government.

There is a large body of Federal statutes that have established some two hundred agents of the government and fixed their powers. The statutes establishing the Federal Courts and fixing their jurisdiction, organizing the executive departments, and creating the boards and commissions are performing the same functions as similar constitutional provisions would perform. "When viewed from the standpoint of content," says Professor Beard, "there is no intrinsic difference between many statutes and the provisions of the Constitution itself; and, if we regard as constitutional all that body of law relative to the fundamental organization of the three branches of the federal government—legislative, executive and judicial—then by far the greater portion of our constitutional law is to be found in the statutes."<sup>20</sup> While it is true that the statutory development of the Constitution unlike the formal amendments may be changed by Congress, it is not likely to be more radically modified than the changes of society will require. This is as much permanency as any part of the Constitution should have. Such legislative development of the Constitution differs from amendments more as to method of enactment than as to their constitutional character—the former being enacted by the ordinary process of law-making and subject to modification or repeal by the same process and the latter being enacted by an extraordinary process and subject to repeal by the same process. Of course, amendments unlike the statutes are not subject to judicial review, but are subject to judicial interpretation, which may radically change their original intent as has been the case with the Fourteenth Amendment.

2. *By Judicial Decisions.* Jefferson once said that John Marshall and the Supreme Court were engaged in making a constitution for the government. He was right. The great body of American constitutional law is not to be found in our written Constitution. It is unwritten in a legal and constitutional sense and is to be found in the decisions of our courts. The forefathers realized that the rigidity of a constitution was an element of fragility and instability. "It is for this reason," said Tiedeman, "that the Federal Constitution contains only a declaration of the fundamental and most general principles of constitutional law, while the real, living constitutional

<sup>19</sup> John Preston Comer, *Legislative Functions of National Administrative Authorities* (1927), 137-169.

<sup>20</sup> *Ibid.*, 94-95.



law,—that which the people are made to feel around and about them, controlling the exercise of power by government, and protecting the minority from the tyranny of the majority—the flesh and blood of the Constitution, instead of its skeleton, is here, as well as elsewhere, unwritten; not to be found in the instrument promulgated by a constitutional convention, but in the decisions of the courts and acts of the legislature, which are published and enacted in the enforcement of the written Constitution. The unwritten constitution of the United States, within the broad limitations of the written Constitution, is just as flexible, and yields just as readily to the mutations of public opinion as the unwritten constitution of Great Britain.”<sup>21</sup>

“The Constitution,” said Woodrow Wilson, “is not a mere lawyers’ document; it is, as I have more than once said, the vehicle of a nation’s life. No lawyer can read into a document anything subsequent to its execution; but we have read into the Constitution of the United States the whole expansion and transformation of our national life that has followed its adoption. We say without the least disparagement or even criticism of the Supreme Court of the United States that at its hands the Constitution has received an adaptation and an elaboration which would fill its framers of the simple days of 1787 with nothing less than amazement.”<sup>22</sup> It is undoubtedly true that the Supreme Court has been the chief architect of an unwritten constitution that is little understood or appreciated by most Americans but which has been the most important factor in the successful operation of our complicated system of a dual government.

Among the more fundamental contributions to the Constitution made by the Supreme Court may be mentioned:

(1) The doctrine of implied powers which says that the national government has powers that are incidental and subsidiary to certain specifically enumerated powers.<sup>23</sup> For instance, from the power of taxation are derived the powers to establish banks and exempt their notes from state taxation, to create a system of revenue cutters and custom houses, to levy a tariff to protect American industry; from the power to regulate commerce have been deduced the powers to control the transportation of goods and passengers from state to state and all navigable waters not situate entirely

<sup>21</sup> Christopher G. Tiedeman, *The Unwritten Constitution of the United States* (1890), 43.

<sup>22</sup> *Op. cit.*, 157-158.

<sup>23</sup> *McCulloch v. Maryland* (1819), 4 Wheaton 316.

in a single state, to construct public works helpful to interstate commerce, to regulate immigration, and to establish a commerce commission endowed with legislative, judicial, and administrative powers over interstate traffic. The written Constitution leaves intrastate commerce to state regulation, but the unwritten constitution reads as follows: "There is no room in our scheme of government for the assertion of state power in hostility to the authorized exercise of Federal power. The authority of Congress extends to every part of interstate commerce and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the *commingling of interstate and intrastate operations*. This is not to say that the Nation may deal with the internal concerns of the state as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so *interwoven therewith that the effective government of the former incidentally controls the latter*." <sup>24</sup> Here is a plain case in which a granted power absorbs a reserved power notwithstanding the fact that the written Constitution as effectively reserves the latter as it grants the former. Are we to conclude that when a reserved power gets in the way of a granted power the latter has the right of way? Is one part of the Constitution paramount to another? What becomes of the protection of reserved powers supposedly afforded by the Tenth Amendment?

The war power has come to have progeny that make it difficult to recognize the kinship supposedly existing. The power of Congress to declare war includes the power to recognize the existence of war already begun by another nation against the United States. It has also been held that the President has the power to recognize the existence of a state of war.<sup>25</sup> When war is actually being waged against the nation, what is the President to do? "It seems meticulous," says an eminent constitutional lawyer, "to insist that in the presence of actual hostilities the President is under a constitutional obligation to shut his eyes to plain facts."<sup>26</sup> By the war power Congress can conscript the man power and the property of the country, take over the railroads, and make the rates for both inter- and intrastate shipping, subordinate the police powers of

<sup>24</sup> *Minnesota Rate Cases* (1912), 230 U. S. 352.

<sup>25</sup> *The Prize Cases* (1862), 2 Black 635.

<sup>26</sup> Lawrence B. Evans, *Leading Cases on American Constitutional Law* (1925), 566.

the states to its own authority, and prohibit the sale of liquor regardless of the destruction to property involved; and the President may invade the country of the enemy and subject it to the sovereignty of the United States, establish a government for the country, and provide it with a set of courts. These are only a few of the meanings given to the war power by the unwritten constitution.<sup>27</sup> The doctrine of implied powers first formulated by Hamilton in his opinion on the constitutionality of the United States Bank and later more fully stated by Marshall in *McCulloch v. Maryland* has been so repeatedly upheld by the Supreme Court and so unreservedly accepted by the nation that it is an axiomatic fact of our constitutional law.

(2) The doctrine of inherent powers which says that the national government has certain powers by virtue of being the agent of a sovereign nation. The nation has at times found itself in a predicament. Is it to be conceded that nations like Great Britain, France, and Germany can do things that the United States cannot do? Justice Gray in *Juilliard v. Greenman* speaks of Congress as the "legislature of a sovereign nation," and as exercising "the powers belonging to sovereignty in other civilized nations."<sup>28</sup> "The Constitution of the United States," said Justice Bradley, "established a government, not a league, compact or partnership. . . . As a government it was invested with all the attributes of sovereignty. . . . The United States is not only a government, but it is a national government, and the only government in this country that has the character of nationality. . . . Such being the character of the General Government, it seems to be a *self-evident proposition that it is invested with all those inherent and implied powers which, at the time of adopting the Constitution, were generally considered to belong to every government as such, and as being essential to the exercise of its functions.*"<sup>29</sup>

The doctrine of inherent powers rests on *necessity* and was first expressed by James Wilson in 1785. "The United States have general rights, general powers, and general obligations, not derived from any particular State, nor from all the particular States taken separately; but resulting from the union of the whole. . . . To many purposes the United States are to be considered as one undivided, independent nation; and as possessed of all the rights,

<sup>27</sup> See *Selective Draft Cases* (1918), 245 U. S. 366; *Northern Pacific Ry. v. North Dakota* (1919), 250 U. S. 135; *Dooley v. United States* (1900), 182 U. S. 222; *DeLima v. Bidwell* (1901), 182 U. S. 1.

<sup>28</sup> 110 U. S. 421.

<sup>29</sup> *The Legal Tender Cases* (1871), 12 Wallace 457, 555, 556.

powers and properties by the law of nations incident to such. Whenever an object occurs, to the direction of which no particular State is competent, the management of it must of *necessity* belong to the United States in Congress assembled." <sup>30</sup>

This is the heart of the doctrine. The nation can not amend the written Constitution every time it is faced with a problem which it cannot otherwise handle. It is, however, a mockery of logic to attempt to persuade oneself that such a doctrine is based on the written Constitution. It is part and parcel of the unwritten constitution for the new United States. It is just the reverse of the doctrine of granted powers. It does not discriminate between a government of granted powers and the nation itself.

(3) The sacredness of contract doctrine is one of the most far reaching provisions of the unwritten constitution. The written constitution hints at this doctrine when it forbids any state to pass a law impairing the obligation of contract, evidently referring to private contracts. In 1819 in his decision of the famous case of *Dartmouth College v. Woodward*,<sup>31</sup> Chief Justice Marshall extended the application of this provision to agreements made by state legislatures in the form of charters or concessions. This decision made corporations sacrosanct and immortal. It placed business relations and private rights upon an entirely new basis. However expedient the decision may have been regarded at the time from the point of view of its giving incentive and stability to business enterprise when the nation was just beginning to develop corporate wealth, the fact remains that the court was far afield of the written Constitution. "The doctrine of this case," said Justice Brown, "has been subjected to more or less criticism by the courts and the profession, but has been reaffirmed and applied so often as to have become firmly established as a canon of American jurisprudence." <sup>32</sup> "It is under the protection of the decision of the Dartmouth College Case," said a distinguished jurist, "that the most enormous and threatening powers in our country have been created; some of the great and wealthy corporations actually having greater influence in the country at large, and upon the legislation of the country, than the States to which they owe their corporate existence." <sup>33</sup>

<sup>30</sup> James Wilson, *Works* (Andrews' Ed.), I, 557. See Hamilton, *Works* (Lodge Ed.), III, 184.

<sup>31</sup> 4 Wheaton 518.

<sup>32</sup> *Pearsall v. Great Northern Ry.* (1896), 161 U. S. 646.

<sup>33</sup> Cooley, *A Treatise on Constitutional Limitations* (8th Ed., 1927), I, 567, footnote.



(4) The principles of taxation laid down in the Constitution have been considerably supplemented by judicial doctrines. Among these may be mentioned the fact that the due process clause of the Fourteenth Amendment requires that state taxes must be for a public purpose,<sup>34</sup> that a tax may be regulatory in character,<sup>35</sup> and that neither the national government nor the state governments can tax the instrumentalities of the other.<sup>36</sup> The states cannot tax the salaries of federal officials, lands of the Federal government, franchises granted by it, or its property; nor can the Federal government tax the bonds of the states or municipalities or the income from them. These doctrines cannot be traced to specific constitutional provisions but are based on its general spirit and purpose.

(5) One of the most important developments in recent years is the doctrine that Congress is not bound by the Constitution in its control of territories. We seem to have a Congress for the United States which can suddenly transform itself into an Imperial Congress and legislate for territories without constitutional limitations. "The territories of the United States", said Justice Nelson, "are entirely subject to the legislative authority of Congress. They are not organized under the Constitution nor subject to its complex distribution of powers of government as the organic law, but are the creation exclusively of the legislative department and subject to its supervision and control."<sup>37</sup> Congress, therefore, has plenary power to impose such laws and forms of control as it thinks best suited to the needs of the people in a territory whether it be continental or insular. The government of a territory is a legislative government and its courts are legislative courts. This means that neither the Constitution nor the general statutes of the United States apply to new territory until Congress by special act so declares.<sup>38</sup> It is not acquisition, or the establishment of a territorial government, but incorporation by Congress that extends the provisions of the Constitution to a territory. "Until Congress shall see fit to incorporate territory ceded by treaty into the United States," said Justice Day, "we regard it as settled . . . that the territory is to be governed under the power existing in Congress to make laws

<sup>34</sup> *Loan Association v. Topeka* (1875), 20 Wallace 655.

<sup>35</sup> *Veazie Bank v. Fenno* (1869), 8 Wallace 533.

<sup>36</sup> *McCulloch v. Maryland* (1819), 4 Wheaton 316; *The Collector v. Day* (1871), 11 Wallace 113.

<sup>37</sup> *Benner v. Porter* (1850), 9 Howard 235, 242.

<sup>38</sup> *Downes v. Bidwell* (1901), 182 U. S. 244; *Hawaii v. Mankichi* (1903), 190 U. S. 197.

for such territories and subject to such constitutional restrictions upon the powers of that body as are applicable to the situation.”<sup>39</sup>

(6) The Constitution does not expressly bestow upon the Supreme Court the power to invalidate the acts of Congress which are in its opinion contrary to the Constitution. This practice of the court, begun in the case of *Marbury v. Madison* (1803) and based on logic rather than any specific constitutional provision, has come to constitute the most notable feature of the American system of government. Many of the most critical students of American constitutional law contend that the written Constitution contains no provision on which this power of the court could be based and that the records of the Federal Convention of 1787 are silent also on this matter. In their opinion, therefore, the doctrine of judicial review is simply a convention of the unwritten constitution.

These illustrations of judicial expansion of the Constitution might be considerably extended. Had our Supreme Court interpreted the Constitution with as much strictness and literality as the Judicial Committee of the English Privy Council has practiced in construing the British North American Act of 1867, the constitution of Canada, the unwritten constitution would be a much less significant affair. It may be expected that the Court will continue this development. It seems that while the Constitution may limit the Executive and Congress, the Court is limited only by the conservatism of the bench and public opinion. The doctrine which Marshall applied to Congress in *Marbury v. Madison*<sup>40</sup> might with equal propriety be applied to the Court in his own language: “To what purpose are powers limited and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?”

3. *By Party Practices.* American political parties have largely democratized our system of government by developing an unwritten constitution which in many instances, while not changing the letter of the Constitution, has completely altered its meaning and effect. “Party organization,” said Ford, “acts as a connective tissue, enfolding the separate organs of government, and tending to establish a unity of control which shall adapt the government to the uses of popular sovereignty.”<sup>41</sup> They have made a representative institution of the Presidency by converting the electoral college into a party agency, by making partisans of the cabinet members, by

<sup>39</sup> *Dorr v. United States* (1904), 195 U. S. 138.

<sup>40</sup> 1 Cranch 137.

<sup>41</sup> *The Rise and Growth of American Political Parties* (1900), 215.

nominating and electing a President on a party program, and by making him a prime minister in the legislative process to aid them in enacting a large part of this platform into law, and by controlling his administration of the law as well as his appointment power in their interest.

They have converted the Senate from a state rights body into a popular agency by changing the written Constitution and by an electoral process smacking of popular sovereignty. This change has aided in so strengthening the Senate as to alter the bicameralism of Congress very materially. While the forefathers intended that the Senate should be a sort of Privy Council to the President and act in legislative matters as the watchful sentinel of the rights of the states as such, it has in the new order of things become the dominating agent of the government.

Political parties have also made the House of Representatives, its organization, procedure, and powers, into an agency of the caucus. Its Speaker is nominally an officer of the House, but actually exercises his power according to the dictation of the caucus. Its committees in both personnel and action are under the same control.

The President's cabinet is also unknown to the written Constitution. It is a party agent. It generally possesses political solidarity or its members hold the views of the President. They frame legislation, induce members of the Senate and House to introduce their proposals, and enter committee rooms to influence the actions of committees on their proposals. It is generally expected that its members will be selected from the leaders of the President's party.

The doctrine of separation of powers and checks and balances—that palladium of safety of the forefathers and the saving grace of the “literary constitution”—does not exist in the unwritten constitution. It has no place in government by political parties. The American people have learned that our government works best under the unwritten constitution and hence they try to give the President a safe majority in both houses so that he can be a premier and run the government. This is what President Wilson meant in 1918 when he asked that a Democratic majority be retained in Congress.

Impeachment has likewise practically disappeared and under the influence of political parties certainly has broken down as an effective agent of control. It was abolished in Great Britain by the development of party government and the same result has practically been accomplished in this country for the same reason. Party

government is a more democratic form of control than a government of law and is, therefore, subject to public opinion and not to constitutional provisions. It is logical as well as inevitable that public opinion would be substituted for impeachment in any method of democratic control. It is a much more effective agent for the removal of officials than impeachment. In fact in recent years impeachment seems to have become a method of political preferment while the casualties of public opinion generally remain permanently interred.

4. *By the Treaty-making Power.* Treaty-making is exclusively a power of the national government. A treaty is a part of the supreme law of the land and is, therefore, binding upon the courts whereas an act of Congress is valid only when it is "in pursuance of the Constitution." "When the two relate to the same subject", said Justice Field, "the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing."<sup>42</sup> A treaty always prevails over the constitution or statute of a state.<sup>43</sup> It is possible, therefore, for the national government to invade the reserved powers of the states by the treaty-making process when it cannot do it by an act of Congress. The capacity of aliens to own and inherit lands in the several states, the extradition of persons accused of crime against the laws of the states, and the rights of aliens to engage in business in the states are examples of matters which have been regulated by treaty, sometimes supplemented by legislation, but which in the main could not have been controlled by legislation alone.

The purchase of the Louisiana Territory by treaty started a practice that has been repeated so many times in our history that no one now has any constitutional scruples about it. The controlling of the size of the American navy by treaty is another illustration of how important treaties are coming to act as limitations upon our government. It is undoubtedly true that in the future the treaty-making process will become a much stronger agent of constitutional changes.

5. *By Custom.* "In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office," says the Constitution, "the

<sup>42</sup> *Whitney v. Robertson* (1887), 124 U. S. 190, 194.

<sup>43</sup> *Ware v. Hylton* (1796), 3 Dallas 199.



same shall devolve on the Vice President.”<sup>44</sup> This means that the powers and duties of the office, and not the office, “shall devolve on the Vice President.” In case of inability, the President would not cease to be President, but cease to act as President for the time being in which case the Vice President would become Acting President but not President. He would be Vice President acting as President, at which time we should have two Presidents. Since inability is mentioned in the same category with removal, death, or resignation, the Constitution undoubtedly means that the Vice President becomes only Acting President in each eventuality. The Constitution further provides that in case of removal, death, resignation, or inability of both the President and the Vice President Congress may by law declare “what officer shall then act as President.” Such officer like the Vice President would act as President and not become President. The Twelfth Amendment in prescribing what shall be done in case of a failure to elect a President by either the Electoral College or the House of Representatives says that “the Vice President shall act as President as in case of the death or other constitutional disability of the President.” This makes a clear case that according to the written word the Vice President never becomes President. The unwritten constitution, however, makes him President. He takes the Presidential oath, signs his name as President, is addressed by heads of departments and officers of the Government as President, and is so regarded by the nation. By the same unwritten law the Vice Presidency is made vacant on such occasion when according to the Constitution only the Presidency of the Senate is vacant and the Senate is required to elect a President *pro tempore*, not a Vice President of the United States.<sup>45</sup>

The action of Washington in 1796 in refusing to become a candidate for a third presidential term has had a tremendous influence in American politics. While there have been candidates for the nomination for a third term, only one man, Roosevelt, has been nominated for a third term, and he was not elected.<sup>46</sup> Washington thought that the spirit of American institutions was better served by rotation in office. Jefferson and Jackson were both strongly urged to become candidates for third terms, but both felt that such action on their part would have repudiated their prin-

<sup>44</sup> Art. III, Sec. 3.

<sup>45</sup> A. K. McClure, *Our Presidents and How We Make Them* (1902), 74.

<sup>46</sup> Roosevelt, however, had served only one *elective* term and was not in office at the time of his nomination for a third term.

ciples. Jefferson was the first President to decline a third term as a matter of principle. After having been invited by a number of states to become a candidate for a third term, he said: "That I should lay down my charge at a proper period is as much a duty as to have borne it faithfully. If some termination to the services of the Chief Magistrate be not fixed by the Constitution, or supplied by practice, his office, nominally four years, will in fact become for life; and history shows how easily that degenerates into an inheritance. Believing that a representative government responsible at short periods of election is that which produces the greatest sum of happiness to mankind, I feel it a duty to do no act which shall substantially impair that principle; and I should unwillingly be the first person who, disregarding the sound precedent set by an illustrious predecessor, should furnish the first example of prolongation beyond the second term of office."<sup>47</sup> Jackson six times recommended in his messages the amending of the Constitution, limiting the President to a term of four or six years. General Grant was urged for a third term and apparently was willing to accept a third term. In 1876 the House of Representatives passed a resolution calling this proposal "unwise, unpatriotic, and fraught with peril to our free institutions." After an interval of four years another effort was made to nominate him but the tradition against the third term defeated him. "Grant would have been nominated by acclamation," declared Senator Foraker, "if it had not been that there was a deep-seated prejudice in the minds of many of his warmest friends, as well as in the minds of the people generally, against a third term. Washington was still remembered, honored, and revered by his countrymen. The example he had set had become an *unwritten law*, and the people were not willing to violate it even for their greatest hero and most popular fellow-countryman."<sup>48</sup> Cleveland was urged by some of his friends for a third term, but the Democratic Convention of 1896 adopted a plank in its platform, saying "We declare it to be the *unwritten law* of this republic, established by custom and usage of a hundred years, and sanctioned by the examples of the greatest and wisest of those who founded and have maintained our government, that no man shall be eligible for a third term of the presidential office."<sup>49</sup>

It can finally be said in support of the validity of this constitu-

<sup>47</sup> Quoted in W. W. Willoughby, *The Constitutional Law of the United States*, II, 1148.

<sup>48</sup> J. B. Foraker, *Notes of a Busy Life* (1916), I, 140.

<sup>49</sup> Edward Stanwood, *A History of the Presidency* (1912), I, 546.

tional usage that no one has yet served a third term as President. There is undoubtedly less objection to a third term after an interval of four years than to three consecutive terms. Outside of the weight of this practice set by the illustrious Washington, there are several other factors that help to preserve it. The burden of the office is tremendous and after the honor attached to it has been held for eight years, the likelihood will be that its occupant will be ready to retire. The age of most Presidents by the time they have served eight years is such as practically to compel retirement. Most Presidents who go into office as leaders of their party lose this control before eight years have passed. It is unlikely that any figurehead President will break the tradition. The extension of the merit system weakens the influence of the President and dampens the zeal of the partisan. There will not likely be any more Civil War heroes to worship. The increasing independence of American voters makes it more difficult for political parties to ignore public opinion in the selection of their candidates. Politics is on a broader basis than heretofore and all signs indicate further progress in this direction. It would seem, therefore, that the future will offer at least as much security for the third term tradition as was afforded by the past.

The President's cabinet is entirely a product of usage inasmuch as there is no provision for such an institution in the Constitution. Washington created it and it has become so fundamentally a part of our system that it would be considered revolutionary if a President should decide not to use it. It is also an unwritten law that each head of a department is a member of it. We now talk about creating another member of the cabinet. This lusty youth of the unwritten constitution is a far more significant agent in the every day workings of our government than the hoary Electoral College created by the original charter and periodically forced to sign on the dotted line, and will undoubtedly in the future become a still stronger force in both legislation and administration.

It is also interesting to note that while it is usage alone that has made legislative leaders of the members of the English cabinet who were at first only advisers to the King and responsible to him alone, it is also usage alone that prevents the American cabinet from debating measures on the floors of the American Congress. The Act of 1789, establishing the department of treasury, gave its Secretary the right to appear in person in either House, but in 1790, when Hamilton was ready to present his "Report on the Public Credit," Congress after debate decided that it did not care to have this

done, ostensibly because of its lengthy and detailed character, but actually because of the far reaching significance of the precedent. Later members of the House of Representatives made an effort to have Hamilton and Knox participate in a discussion of the failure of St. Clair's expedition against the Indians, but a majority of the House objected. Usage has continued to enforce this precedent, and is, therefore, primarily responsible for a fundamental weakness of our cabinet system. It is this usage which prevents the President through the cabinet from dealing directly and openly with Congress and forces this contact to take place in the committee rooms in secret.

By the unwritten constitution the President is a much stronger factor in legislation than he is by the original charter. He becomes an agent in legislation when he practically dictates the platform of the party through the platform committee in the national convention. Through his influence over members of Congress, his party leadership, and his ability to influence public opinion, not to mention the various uses of the veto power some of which are based on party influence, he is the strongest single legislative agent connected with the government.

The Senate shares more largely in the appointment power and in treaty-making than the Constitution intended. The Senate largely controls the President's nominations and by introducing reservations into treaties enters the field of diplomatic negotiation, both of which by the written Constitution belong exclusively to the President.

It is undoubtedly true that the average American, and the statement might be made more inclusive, does not know that our government has developed an unwritten constitution at all. It is an inevitable and necessary development with all governments, the more rigid the written constitution, the more rapidly the unwritten constitution will develop. This has been the case with the American system. Strong Presidents, judicial review, and the party system have been the chief architects of our unwritten Constitution, and have thus saved the American people from the rigidity of the original charter. It is unlikely that this development has reached its culmination.<sup>50</sup>

<sup>50</sup> It yet remains for some American well trained in political science and American Constitutional law and conversant with the actual practices of our government to produce an epoch-making treatise on our unwritten constitution. The best account of its development is Herbert W. Horwill, *The Usages of the American Constitution* (1925), on which I have drawn heavily for some phases of the above material.



## CHAPTER VIII

### CITIZENSHIP AND SUFFRAGE

There cannot be a nation without a people. The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association. He owes it allegiance and is entitled to its protection.—Chief Justice WAITE, *Minor v. Happersett*, 21 Wallace 162.

#### I. CITIZENSHIP

1. *The Meaning of Citizenship.* Citizenship according to international law denotes membership in a state.<sup>1</sup> In a legal sense, it is practically synonymous with nationality<sup>2</sup> and indicates that the citizen or subject<sup>3</sup> owes allegiance to the state of which he is a member. Since nationality in this sense is determined by municipal law, it may happen that several states will claim the allegiance of the same individual, or that the individual will be without nationality.<sup>4</sup> From the point of view of international law the privileges, immunities, and obligations of all citizens or subjects are the same.

States, however, by constitutional or municipal law may at their discretion assign their citizens to various groups and accord them different rights both civil and political. This right to classify their citizens is generally used to distinguish between male and female and adult and minor. In the United States citizenship is a rather complicated matter by reason of our federal form of government.

2. *The Dual Character of American Citizenship.* It was a matter

<sup>1</sup> Amos S. Hershey, *The Essentials of International Public Law and Organization* (1927), 347.

<sup>2</sup> Nationality is used here in a legal and not a political or ethnological sense.

<sup>3</sup> Citizen and subject have the same connotation in international law, but it is customary to speak of members of a state with a republican form of government as citizens and of those of a state with monarchical form as subjects; i.e., citizens of France, Germany, or the United States and subjects of Great Britain and Italy.

<sup>4</sup> A naturalized citizen may remove to another country and remain long enough to lose his naturalized citizenship, and he may not in this interval have met the requirements for citizenship in this country.

of controversy whether under the Articles of Confederation there existed a double citizenship.<sup>5</sup> This controversy was eliminated by the adoption of the Constitution which definitely recognizes a citizenship of the United States and one of each state, to each of which attach certain privileges, immunities, and obligations. It is provided that the President must be a natural born citizen of the United States and that Representatives must have been citizens of the United States for seven years and Senators for nine years.<sup>6</sup> State citizenship is recognized in the "privileges and immunities" clause and in the jurisdiction of the federal courts.<sup>7</sup>

3. *The Relation between United States and State Citizenship.* It was generally held before the adoption of the Fourteenth Amendment that United States citizenship was derived from state citizenship except in the cases of naturalization. Chief Justice Taney held that "every person, and every class and description of persons, who were at the time of the adoption of the Constitution recognized as citizens in the several states, became also citizens of the new political body; but none other."<sup>8</sup> However, it was always true after the adoption of the Constitution that the allegiance of a citizen to the United States was superior to his duty to the state. The Constitution, the laws passed in pursuance of it, and treaties made under the authority of the United States were the supreme law of the land. The citizen in case of conflict between the constitutional authority of the United States and that of his state had no choice.

The Constitution as originally adopted did not define citizenship nor did it fix the relation existing between national and state citizenship, but the Supreme Court has held that the adoption of the Fourteenth Amendment "completely broadened the national scope of the government under the Constitution by causing citizenship of the United States to be *paramount* and dominant, instead of being subordinate and derivative."<sup>9</sup> In fact, the states have no power to withhold or confer citizenship. State citizenship is incidental to United States citizenship and is a mere matter of legal residence as a prerequisite to the exercise of political rights.<sup>10</sup> Of

<sup>5</sup> See John Norton Pomeroy, *Constitutional Law* (1888), 48, and the opinion of Justice Curtis, *Scott v. Sandford* (1857), 19 Howard 393, 572.

<sup>6</sup> *Constitution*, Art. I, Secs. 1 and 2.

<sup>7</sup> *Ibid.*, Art. III, Sec. 2.

<sup>8</sup> *Scott v. Sandford* (1857), 19 Howard 393, 406.

<sup>9</sup> *Selective Draft Cases* (1918), 245 U. S. 366, 369.

<sup>10</sup> "A citizen of the United States residing in any State of the Union is a citizen of the State." *Gassies v. Ballou* (1832), 6 Peters 761.

course, it is possible to be a citizen of the United States without being a resident of any state. This is true of American citizens residing in the District of Columbia, and in incorporated territories, and of those whose legal residence is on foreign soil.

4. *How Citizenship Is Acquired.* Citizenship may be acquired by either birth or naturalization.<sup>11</sup> By the Fourteenth Amendment all persons born in the United States and subject to its jurisdiction are citizens of the United States and of the states wherein they reside, irrespective of the nationality of their parents. This is true of children born in the United States of parents who are ineligible to naturalization.<sup>12</sup> The jurisdiction above mentioned is not territorial but political. Hence children born of diplomatic representatives in the United States or on board foreign vessels in American harbors, or of alien enemies invading the United States are not American citizens. Children born of American citizens abroad are, if duly registered by officers of our Foreign Service, American citizens. Children born in an American embassy or on an American vessel at high sea or in a foreign port are considered born on American soil and under our jurisdiction. American citizenship is, therefore, based on both the doctrine of *jus soli*, or citizenship by soil, and that of *jus sanguinis*, or citizenship by blood.

Naturalization was in the hands of the states under the Articles of Confederation. This resulted in such diversity of enactments on the subject that its complete control was given by the Constitution to Congress. By naturalization is meant the legal process by which an alien becomes a citizen. It may apply to individuals, classes of persons, or the population of an entire territory and may be the result of a special act of Congress, a treaty, or judicial process according to law. Congress has conferred citizenship on particular individuals, on groups of Indians, in 1900 on the Hawaiians, in 1917 on the Porto Ricans, and in 1927 on Virgin Islanders who had not retained Danish citizenship. Citizenship was conferred upon the inhabitants of Louisiana by the treaty of purchase of 1803<sup>13</sup> and upon Texans by the joint resolution of Congress admitting Texas in 1845.

The individual process of naturalization is very carefully outlined and protected by law. In the first place only white aliens and those of African descent can be naturalized. In the second place

<sup>11</sup> Frederick A. Cleveland, *American Citizenship* (1927), 50-77.

<sup>12</sup> *United States v. Wong Kim Ark* (1898), 169 U. S. 649.

<sup>13</sup> Citizenship was granted to the inhabitants of Florida by treaty in 1817 and to those of Alaska in 1867.

the process can be effected by definitely designated courts, including circuit courts of appeals and district courts of the United States, the supreme court of the District of Columbia, district and supreme courts of Territories, and state courts having equity or law jurisdiction in cases in which the amount in controversy is unlimited, and having a seal and a record. The jurisdiction of these courts applies only to aliens resident in their respective districts. In the third place the process is marked by specific steps which the applicant must take. These are: first, *declaration of intention*, at which time the alien receives his "first papers" of citizenship, and second, the taking of final citizenship papers. The first step can be taken only after one year of residence by the alien and not less than two nor more than seven years can intervene between the two steps. The first papers are issued only after the following conditions have been met:

- (1) The alien must be at least eighteen years of age.
- (2) He must appear before one of the above courts at least two years before receiving his final papers, make declaration of intention of becoming an American citizen, renounce allegiance to the country of which he is a citizen or subject, and swear allegiance to the United States.
- (3) He must at the same time present to the court satisfactory evidence of his character and of the method of his arrival in the United States.

The final papers, or certificate of citizenship, are granted when the following conditions have been met:

- (1) The alien must have been a resident of the United States for at least five years and must be twenty-one years of age.
- (2) He must present a petition to the court in which he states his full name, date and place of birth, residence, occupation, and the place from which he emigrated. The petition must be signed by himself and two reliable American citizens who must testify that they have known him for five years and that he is of good moral character.
- (3) He must be able to read and write English and pass an examination in such subjects as American history, civics, and geography.
- (4) He must declare that he is not opposed to organized government and does not believe in polygamy.
- (5) Ninety days must intervene between the filing of the peti-



tion and the granting of citizenship papers by the court; and to prevent the wholesale use of naturalized foreigners in an election, citizenship papers cannot be granted within thirty days of an election in the jurisdiction of the court having charge. A fee of one dollar is required for the filing of declaration of intention and one of four dollars for the petition and certificate of citizenship. One half of all such fees collected by state courts is forwarded to the Department of Treasury and all of such amounts in excess of six thousand dollars. A copy of every naturalization paper must be filed with the bureau of naturalization. Certificates of citizenship procured through fraud or illegality may be annulled by the courts.<sup>14</sup>

5. *The Citizenship and Naturalization of Women and Minors.* The naturalization of a parent automatically naturalizes the minor children if they are residents of the United States at the time of naturalization. The widow and minor children of an alien who dies or becomes insane before the process of naturalization is completed may by further complying with its requirements be naturalized without making declaration of intention. The rules for naturalization of women are the same as those for men except in the case of married women for whom the process has been somewhat simplified. After the adoption of the suffrage amendment for women, it was felt that married women should be placed on an equality with their husbands in the matters of citizenship and suffrage. By the Cable Act of 1922, an alien woman marrying an American citizen is not naturalized by this act but may become an American citizen after one year of residence without declaration of intention. Also under this act American women marrying foreigners do not thereby lose their citizenship, unless their husbands are ineligible to citizenship.

6. *The Citizenship of Indians.* From the foundation of the government Indians have been regarded as the wards of the nation. They have enjoyed immunity from taxation if they lived in tribes and have not been considered citizens in a domestic sense. They have been regarded as American nationals according to international law and hence accorded the diplomatic protection of the government abroad.

The general tendency has been to prepare the Indian by education to become an American citizen and to grant him this status as soon

<sup>14</sup> *Johannessen v. United States* (1912), 225 U. S. 227; *Luria v. United States* (1913), 231 U. S. 9.

as it was desirable. Various treaties were made with tribes by which they could become citizens by the process of naturalization required of aliens. Special acts of Congress dealing with allotments of land granted citizenship to various groups. Minor children became citizens with their parents and those born of Indian citizen parents have been regarded as citizens as well as those legitimately born of an Indian woman with a white citizen father. However, in 1924 Congress conferred citizenship on all non-citizen Indians born within the territorial limits of the United States, preserving at the same time their property rights.

7. *The Status of the Inhabitants of American Territories.* The inhabitants of our insular possessions occupy a status similar to that held by our dependent nation of Indians until 1924. They are neither American citizens nor aliens. They can duly become American citizens by special act of Congress. They are regarded as nationals and, therefore, dwell somewhere in that hazy realm of legal fiction that separates citizenship and alienage, a status quite clear to our Supreme Court but not satisfactory to our territorials. This is the status of the inhabitants of Guam, Samoa, and the Philippine Islands. They have the international privileges of citizens and enjoy the diplomatic protection of our government in their exercise. Filipinos may become American citizens by naturalization.

8. *Expatriation.* Expatriation is the renunciation of allegiance to the state of which one is a citizen and the assumption of a different. The government of the United States in 1868 recognized the right of expatriation as a natural and inherent right of all people and indispensable to the enjoyment of life, liberty, and the pursuit of happiness. Great Britain did not abandon the doctrine of "indelible allegiance" until 1870. Germany regards ten years of uninterrupted residence abroad as a possible abandonment of citizenship. France does not recognize the expatriation of citizens who are still liable for military service. Expatriation, therefore, is not a doctrine of international law, but is regulated by municipal (*i.e.*, national) law. The government of the United States in recent years has abandoned its insistence on the absolute right of expatriation regardless of the policies of other nations and is willing to regulate the matter by treaty engagements.

Native-born American citizens are considered to have expatriated themselves when they have complied with the naturalization process of other nations, though they may not expatriate themselves while this country is at war. A naturalized American citizen

loses his citizenship by residence for two years in the country of his former allegiance or by residence for five years in any other country. An American woman, marrying a foreigner and retaining her citizenship, is considered to have expatriated herself, if during the continuance of her marital status, she remains two years in the state of her husband or five years abroad.

9. *Privileges and Immunities of United States Citizenship.* The privileges and immunities of United States citizenship are not the same as those of state citizenship, though an attempt was made by the Fourteenth Amendment to create a single citizenship whose privileges and immunities would be under the sole protection of the national government. But for the failure of this effort, our federalism would have received a serious blow and the national government would have had the tremendous task of protecting the civil rights of the citizens of all the states. The Supreme Court in the *Slaughter House Cases* recognized the gravity of the situation in the following language: "We do not conceal from ourselves the great responsibility which . . . devolves upon us. No questions so far reaching and pervading in their consequences, so profoundly interesting to the people of this country, and so important in their bearing upon the relations of the United States and of the several States to each other, and to the citizens of the States and of the United States, have been before this court during the official life of any of its present members."<sup>15</sup> The court held in substance that there are still two distinct citizenships, a United States citizenship and a state citizenship, and that the privileges and immunities of the former are under the protection of the national government and those of the latter under the protection of the state governments.

The Supreme Court in a series of cases largely as *dictum* (an opinion not necessary to the decision of the case, and therefore not recognized as law) has enumerated many of the privileges and immunities of citizens of the United States. They may be said to embrace the following: (1) to visit the seat of the government, (2) to assert a claim against it, (3) to transact business with it, (4) to seek its protection, (5) to share its offices, (6) to aid in administering its functions, (7) to have free access to its ports, sub-treasuries, land offices, and courts of justice in the various states,<sup>16</sup> (8) to demand its protection of life, liberty, and property on the high seas and within the jurisdiction of foreign governments,

<sup>15</sup> 16 Wallace 36.

<sup>16</sup> *Crandall v. Nevada* (1868), 6 Wallace 35, 44.

(9) to use the navigable waters of the United States, (10) to enjoy the rights secured by treaties with foreign nations,<sup>17</sup> (11) to be a candidate for the Presidency, if a natural born citizen, (12) to be a candidate for the Senate, if a citizen for nine years, and for the House, if a citizen for seven years,<sup>18</sup> (13) to be a citizen of the state wherein he resides, (14) to vote irrespective of race, color, or sex if he meets the other requirements fixed by his state, (15) to make a homestead entry upon unoccupied public lands,<sup>19</sup> (16) to inform federal officials of the violation of federal laws,<sup>20</sup> (17) to be protected against lawless violence while in the custody of a United States marshal.<sup>21</sup> This list could doubtless be extended.<sup>22</sup>

10. *Privileges and Immunities of State Citizenship.* The Constitution provides that the citizens of each state are entitled to all the privileges and immunities of the citizens of the several states.<sup>23</sup> In this clause of the Constitution were incorporated the principles of private international law as a means of regulating many of the relations of the states of the Union just as if they were foreign to each other. "It was undoubtedly the object of the clause in question," said Justice Field, "to place the citizens of each state upon the same footing with citizens of other states, so far as the advantages resulting from citizenship in those states are concerned. It relieves them from the disabilities of alienage in other states; it inhibits discriminating legislation against them by other states; it gives them the right of free ingress into other states; and egress from them; it insures to them in other states the same freedom possessed by the citizens of those states in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other states the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this."<sup>24</sup>

The privileges and immunities protected by this clause refer only to those common to the citizens of the several states, such as protection by government, the right to acquire property, freedom of

<sup>17</sup> *Slaughter House Cases* (1873), 16 Wallace 36, 79.

<sup>18</sup> Charles K. Burdick, *The Law of the American Constitution*, 334.

<sup>19</sup> *United States v. Waddell* (1884), 112 U. S. 76.

<sup>20</sup> *In re Quarles* (1895), 158 U. S. 532.

<sup>21</sup> *Logan v. United States* (1892), 144 U. S. 263.

<sup>22</sup> See Arnold J. Lien, *Privileges and Immunities of Citizens of the United States* (1913), 54 Columbia University Studies in History, Economics and Public Law.

<sup>23</sup> Art. IV, Sec. 2.

<sup>24</sup> *Paul v. Virginia* (1868), 8 Wallace 168.



residence and transit, benefit of *habeas corpus*, and access to courts. Suffrage is not a privilege of state citizenship. The clause does not operate to enforce the provisions of the Constitution and laws of one state in the other states. It does not, however, prevent a state from granting special privileges to its citizens, a constant practice among the states. A state may grant to its citizens the exclusive right of using its own waters to maintain oyster beds.<sup>25</sup> It may charge nonresidents higher tuition rates in its schools or an admission fee to visit its public buildings. In such matters the state is considered to be exercising proprietary rights. Since citizens in this clause refers to natural persons, it is constitutional for a state to exclude a corporation chartered by another state or to prescribe the conditions under which it may transact business within its borders, subject, of course, to the regulations of interstate commerce.<sup>26</sup>

11. *Privileges and Immunities Unattached to Citizenship.* There are certain constitutional guarantees that apply to all persons irrespective of citizenship. They include the guarantees of the bills of rights found in our national and state constitutions, frequently called natural rights. They include such rights as freedom of religion, speech, and the press; assembly, petition, and contract; protection in criminal proceedings and against unreasonable searches and seizures; and a prohibition on the passing of *ex post facto* laws, and the suspension of the writ of *habeas corpus*, except in cases of rebellion or invasion. Likewise the provisions of the Thirteenth Amendment, prohibiting slavery or involuntary servitude everywhere within the United States, and of the Fourteenth Amendment, inhibiting the states from taking life, liberty, or property without due process or denying equal protection of the laws, are applicable to all the inhabitants of the United States.

It should be said that it is in this catalogue of the inhibitions on tyranny that our Constitution appears as a great document of human liberty and is in no sense obsolete. In this respect it broke new ground and became a model for the rest of the world. No other constitution comes so near to protecting these simple yet priceless rights of a free and civilized humanity.<sup>27</sup>

12. *The Obligations of Citizenship.* Possibly too much emphasis

<sup>25</sup> *McCready v. Virginia* (1877), 94 U. S. 391.

<sup>26</sup> See W. J. Meyers, "The Privileges and Immunities of Citizens in the Several States," 1 *Michigan Law Review*, 286, 364.

<sup>27</sup> See Lucius B. Swift, *How We Got Our Liberties* (1928), and Frederic Jesup Stimson, *The American Constitution As It Protects Private Rights* (1923), 30-162.

is placed upon rights as a sort of abstraction. They are, as a matter of fact, relative rather than absolute. If rights were absolute, liberty would degenerate into license and anarchy. The relation between government and its citizens is a reciprocal one. Allegiance and support on the part of the citizen are only a reasonable compensation for protection on the part of the government. Every right has its correlative duty. For the protection of the government and its services, the citizen should be willing to obey its laws, to support it according to his means, and to serve it at all times to the best of his ability.

The citizen has obligations to society as well as to his government. He has no right under the guise of freedom of speech to endanger the reputation of others by libelous or slanderous statements or in the name of religious freedom to disturb the peace or practice immorality. Likewise the use of his own property is subject to restrictions. The state or city will not permit him to endanger public safety or create a nuisance by the use of his property. The state or a city or a public corporation may take his property for a public purpose by the power of eminent domain, by justly compensating him for it. There is, therefore, a law of limitations and obligations underlying all rights and privileges of the individual that compels him to subordinate either by grace or force his interests to those of society and its institutions.

## II. SUFFRAGE

1. *The Nature of the Suffrage.* Distinct from citizenship and yet frequently confused with it is the political privilege of the suffrage. Citizenship is a passive while suffrage is an active status and neither is the basis for conferring the other. The one indicates membership in the state; the other in the electorate. Citizenship in the United States is mainly under the jurisdiction of the national government, while suffrage is primarily under the control of the states. Citizenship is, therefore, on a uniform and equal basis throughout the Union while the basis for suffrage varies with the states.

There are, however, various theories as to the nature of the suffrage. It has been regarded as a natural right, and therefore synonymous with citizenship or at least attached to citizenship. This conclusion logically followed from the theory of popular sovereignty that dominated the American and French revolutions. Montesquieu declared that "all the inhabitants . . . ought to have

a right of voting at the election of representatives, except such as are in so mean a situation as to be deemed to have no will of their own.”<sup>28</sup> The view that is now generally held by political scientists is that it is an office or a function conferred by the state upon only those who are regarded as being most capable of exercising it for the public good.<sup>29</sup> In this sense it is a public trust and implies a moral if not a legal obligation for its faithful and intelligent exercise. James Madison called it “one of the fundamental articles of republican government.”<sup>30</sup>

2. *The Basis of the Suffrage in the Original States.* Despite the fact that the Declaration of Independence had said that governments derive their powers from the consent of the governed, the first state constitutions retained practically the same basis for the suffrage as had existed in the colonies. Suffrage was generally restricted to the holders either of land varying in annual value from three pounds in Massachusetts to fifty in New Jersey or of other tangible property of equal value. In New Hampshire, Delaware, and Georgia only the payment of a tax was required.<sup>31</sup> There was also an age requirement of twenty-one years, a residence requirement of six months to two years, and in some instances a religious qualification. While the suffrage was not entirely on a freehold basis, a property qualification of some kind was required by all of the original thirteen states.

3. *Suffrage in the Federal Convention of 1787.* The Federal Convention seriously considered placing the suffrage on a freehold basis for the electors of federal officers as a means of safeguarding property rights. “Viewing the subject in its merits alone,” said James Madison, with whom many of the leaders in the Convention were in agreement, “the freeholders of the country would be the safest depositaries of Republican liberty. In future times a great majority of the people will not only be without landed, but any other sort of, property. These will either combine under the influence of their common situation; in which case, the rights of property and the public liberty, will not be secure in their hands; or which is more probable, they will become the tools of opulence and ambition, in which case there will be equal danger on another side.”<sup>32</sup>

<sup>28</sup> *The Spirit of Laws* (1748), bk. XI, ch. 6.

<sup>29</sup> See James W. Garner, *Political Science and Government*, 543-547.

<sup>30</sup> Hunt and Scott, *The Debates of the Federal Convention of 1787*, 353.

<sup>31</sup> See W. C. Morey, “The First State Constitutions,” 4 *Annals of the Am. Acad. of Pol. and Soc. Sci.*, 20-22.

<sup>32</sup> Hunt and Scott, *op. cit.*, 353.

Since there was already considerable variation in the bases of the suffrage throughout the states and since they had in several instances departed from the freehold requirement, it was felt that to revert to the freehold basis for the suffrage and thus to disfranchise many of the citizens of the states would endanger the ratification of the Constitution. Madison frankly said: "Whether the constitutional qualification ought to be a freehold would with him depend much on the probable reception such a change would meet with in states where the right was now exercised by every description of the people."<sup>32</sup> Gouverneur Morris thought that the ignorant and the dependent had no more right to the suffrage than children. John Dickinson contended that the restriction of the suffrage to freeholders as the best guardians of liberty was a necessary restriction against the dangerous influence of the multitudes without property and principle with which the country in the course of time would abound.

It was finally decided that the electors of Representatives in Congress should have "the qualifications requisite for electors of the most numerous branch of the state legislature."<sup>33</sup> This was significant in a number of the states which required a higher property qualification for electors of state senators than for those of representatives. Suffrage qualifications for electors of national officers thus became a matter for state determination and they remain subject to certain restrictions which are noticed in another connection.

4. *The Democratization of the Suffrage.* (1) *Manhood Suffrage.* The beginnings of the modification of the suffrage requirements may be credited to Jeffersonian democracy and the frontier. Vermont, the first state from the West to be admitted to the Union, in her Constitution of 1791, practically adopted manhood suffrage. This was true with Kentucky (1792), Tennessee (1796) and the states admitted from the Northwest.

The older states resisted the democratic tendency more stubbornly. A typical argument against giving the man without property the suffrage was made in the New York Constitutional Convention in 1821 by Chancellor Kent: "There is no real demand for it—only a few agitators are stirring the matter up: we are happy and prosperous now. Why run any risks by doubling the number of voters; the extreme democratic principle has been regarded with terror by the wise men of every age, because in every European republic, ancient and modern, in which it has been

<sup>33</sup> *The Constitution*, Art. I, Sec. 2.



tried, it has terminated disastrously and has been productive of corruption, injustice, violence, and tyranny; the poor have no interest in the government because they have no property at stake and Providence has decreed that we shall have the poor with us forever; working men, if enfranchised, would neglect their work and engage in politics for which they are not fitted; the extension of the right to vote to all white men on equal terms will end in the ruin of the government and universal calamity." Despite reactionary influences, Jacksonian democracy and the abolition movement increased the importance of the common man. White manhood suffrage was established in Maryland 1809, Massachusetts 1820, Delaware 1831, Mississippi 1832, Georgia 1835, Rhode Island 1842, Louisiana 1845, Virginia 1850, and North Carolina 1857. It was, therefore, practically 1860 before the principle of manhood suffrage was established.

Free negroes were originally permitted to vote in seven<sup>34</sup> of the thirteen states and later in Vermont, Kentucky, and Tennessee, but they were afterward disfranchised by some of these states.<sup>35</sup> During the period of Reconstruction the Southern States by their Constitutions and laws granted negro men the suffrage. It is erroneous, however, to say that the Fourteenth Amendment granted the suffrage to the negro; along with the Fifteenth Amendment it merely protects this privilege when it is granted. It is, however, a protection that applies equally to all voters.

(2) *Woman Suffrage*. Suffrage for women had been advocated almost from the foundation of the government. With the realization of manhood suffrage and increased emphasis on the natural rights of mankind as a part of the abolition movement, the arguments in favor of woman suffrage became more valid. The acquisition of property by women and the extension in their education were further reasons for granting them equal political rights with men. The growing participation of women in business and industry made it desirable that they have some voice in the making of the laws which regulate these matters. Likewise their interest in the home and the fact that the proper basis for the suffrage was not sex but moral and intellectual qualifications combined to make the total of their arguments convincing.

They were first granted the suffrage by the territory of Wyo-

<sup>34</sup> Connecticut, Massachusetts, New Hampshire, New York, New Jersey, North Carolina, and Rhode Island.

<sup>35</sup> Kentucky 1799, Connecticut 1814, Tennessee 1834, North Carolina 1835, and New Jersey 1844.

ming in 1869, which on entering the Union in 1890, placed an equal suffrage provision in her Constitution. They were granted the right to vote in school elections in Michigan and Minnesota in 1873, in New Hampshire and Oregon in 1878, and in Vermont in 1880. In 1893 they were completely enfranchised in Colorado and in 1896 in Utah and Idaho. The movement rested here for a while but only to gather renewed vigor. Washington in 1910, California in 1911, and Oregon, Kansas, and Arizona in 1912 adopted woman suffrage and Illinois granted women a limited suffrage in 1913.

With the Senators and Representatives in Congress from these equal suffrage states, the women were now in a position for the first time to advocate, with some hope of its realization, the adoption of an equal suffrage amendment to the Constitution of the United States. In 1916 the the major political parties endorsed equal suffrage but regarded it as a matter for state action. Congress in 1919, in response to a special message of President Wilson urging an amendment to the Constitution granting women the suffrage in recognition of their services to the nation during the World War, prepared the Nineteenth Amendment which in about fourteen months was ratified by the legislatures of three-fourths of the states and proclaimed August 26, 1920, as a part of the Constitution of the United States. The amendment forbids the denying or abridging of the right to vote by either the United States or any state on account of sex. It is to be noted that this amendment does not grant women the suffrage but only protects them against discrimination in its exercise. This protection is now extended to all voters regardless of race, color, previous condition of servitude, or sex and applies to governmental action and not that of individuals. However, individuals who violate the spirit of this inhibition may be punished by state authority. Such action of individuals is not regarded as denying or abridging the right of the suffrage but as merely interfering with its exercise.<sup>36</sup>

5. *Suffrage a State Matter.* As has been pointed out, there is no federal suffrage in the United States, an arrangement that seems peculiar to foreigners who study our system. The electors for United States Senators and Representatives are the same as those for the most numerous branch of the state legislatures. The electors for the President are also under the control of the states. The state legislatures may provide for their selection as they see fit. They may be elected by the legislatures, by popular vote, or by

<sup>36</sup> Burdick, *op. cit.*, 425.

party committees. The states could provide an entirely different suffrage for their selection than that used for other purposes. They may be selected from the state as a whole or from districts by whatever method seems desirable. Federal officials are, therefore, chosen by unequally qualified electors selected in the case of Presidential electors by different methods. The states are, however, subject to the limitations of the Fourteenth, Fifteenth, and Nineteenth Amendments in the regulation of the suffrage which apply to elections and, it seems, in case of the Fourteenth Amendment<sup>37</sup> to primaries. These limitations seek to prevent only restrictions based on race, color, previous condition of servitude, and sex.

6. *The Present Qualifications of Voters.* (1) *Age.* A general requirement of all the states is that the voter shall be twenty-one years of age to participate in elections. This is true for both the nomination and election of all grades of officials whether federal or state. Many foreign countries have a higher age requirement and some have a higher age requirement for electors of the membership of the upper houses of their parliaments than for those of the lower. The age requirement in Germany is twenty years and in Russia only eighteen.

(2) *Residence.* Most of the states require a residence of one year in the state, from three to six months in the county, and in some instances thirty days in the election district. Most of the Southern States require two years of residence and Rhode Island three, while Michigan, Indiana, and Nebraska require only six months and Maine only three. The purpose of the residence requirement is twofold: (1) to force the voter to reside in the community long enough to become acquainted with its problems and the qualifications of candidates for office and (2) to prevent a host of voters from being railroaded into a community on the eve of an election to change the political balance in favor of a particular party or candidate.

(3) *Citizenship.* While there is no constitutional connection between citizenship and suffrage, the former has become almost a uniform requirement for the latter by state action. In 1894 sixteen states permitted foreigners to vote if they had formally declared their intention to become American citizens. This number had been reduced to nine by 1914 and now only Arkansas permits this

<sup>37</sup> *Nixon v. Herndon* (1927), 273 U. S. 536. It seems that the Supreme Court in this case holds that the Fourteenth Amendment gives Congress control over primaries as a means of guaranteeing the equal protection of the laws.

practice. It was supposedly a bid for cheap labor. From a political point of view it was an undesirable practice in times of either peace or war, and will doubtless disappear.

(4) *Tax Paying.* In about one-third of the states, eleven of which are Southern States, a poll tax, ranging from fifty cents to two dollars, is a requirement for voting. The requirement is usually defended on the ground that it tends to exclude the unlettered and incompetent voters and that a large part of it goes to support the public schools. It frequently, however, leads to corruption, as the political machine will always see that such voters have tax receipts in the hope that they will not forget the favor when they mark their ballots. While this requirement in the South was undoubtedly intended to disfranchise negro voters, it need not have this effect. It is more likely to enrich the pockets of the political tricksters who hold up party organizations for the means to pay for tax receipts but use a satisfactory portion of such funds to pay for their valuable services. The disfranchisement of ignorant voters, white or black, by honest legislation justly administered is entirely defensible, but when such legislation tends to make a profitable business for professional manipulators of political campaigns, it not only fails to accomplish its original purpose, but creates an even worse menace to popular government.

(5) *Education.* Educational tests are now prescribed by a number of states to exclude illiterate voters. Massachusetts, New York, and Connecticut require the voter to be able to read and write English. This is done primarily to exclude the ignorant foreign-born voter. Most of the Southern States have similar tests ingeniously contrived and administered so as to exclude the negro but not the white voters. There should undoubtedly be educational tests as a qualification for voting in all the states, but they should be so conducted and administered as to apply equally to all voters irrespective of their race, color, sex, or nativity. Such tests so administered would not violate the spirit of the Fourteenth Amendment and would constitute a desirable pathological clinic for the electorate.

(6) *Registration.* Nearly all states now require the voters to register with bipartisan boards in their election districts as a preliminary step to voting. A reasonable length of time is given to register and usually such information as name, residence, and occupation is required. Registration is repeated every year or two as a means of keeping accurate information on the residence of voters and to prevent plural voting. It enables election officers to



check the actual vote cast against the list of registered voters as a means of discovering fraud.

(7) *Other Qualifications.* Certain classes of persons, such as idiots, paupers, vagrants, bigamists and polygamists, duelists, convicted criminals, and the inmates of public institutions are generally disqualified from voting. One-third of the states disfranchise for bribery and a few for commission of election crimes. Usually an act of the legislature is required to restore such a person to the electorate.

It is obvious from these restrictions, which will doubtless be supplemented or made more severe in the future, that many voters otherwise qualified may be disfranchised for a particular election by not complying with their terms. It is a practice of political parties to require the voter to pledge himself to support the nominee of his party in order to participate in primaries. Parties are able to do this as they are not regarded as a governmental agency. It is obvious that if the vote can have nothing to say about the nominees for office, he is practically but not technically disfranchised. He is forced to vote in the regular election, if he votes at all, for candidates whom others have nominated. If the suffrage belongs to the individual as a grant from the state, and usually amounts to a public office, it seems that the state would see to it that he be required to hold this office and discharge its functions throughout the electoral process.

## CHAPTER IX

### THE RISE AND DEVELOPMENT OF AMERICAN POLITICAL PARTIES

"The party is, in fact, the most effective political entity in the modern national State. It has come into existence with the appearance of representative government on a large scale; its development has been unhampered by legal or constitutional traditions, and it represents the most vigorous attempt which has been made to adapt the form of our political institutions to the actual facts of human nature." GRAHAM WALLAS.

#### I. POLITICAL PARTIES IN A DEMOCRACY

Constitutions have sometimes been classified into two types—rigid and flexible. The English constitution is commonly cited as an example of the latter type on account of the fact that it is unwritten and can be changed in the same manner as an ordinary law, by a simple act of Parliament. The American constitution, on the other hand, is said to be rigid because it is reduced to a definite written form and cannot be amended except by extraordinary processes.<sup>1</sup> While there is a certain element of truth in the distinction thus made, it tends to leave out of account the origin and growth of extra-constitutional organs which have appeared almost spontaneously in our governmental system and to-day serve as integral parts thereof.<sup>2</sup> (Among the most important and characteristic of these are American political parties, which were by no means anticipated or provided for by the framers of the Constitution). In fact, as is well known, practically all serious-minded observers of the latter eighteenth century regarded "factions" with great misgiving and fear. As President Lowell once remarked, "To them the idea of a party opposed to the government was associated

<sup>1</sup> A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (8th Ed., 1924), 120; James Bryce, *Studies in History and Jurisprudence* (1901), 124-215.

<sup>2</sup> Herbert Horwill, *The Usages of the American Constitution* (1925), *passim*.

with a band of selfish intriguers, or a movement that endangered the public peace and the security of political institutions.”<sup>3</sup> Hamilton’s distrust of the people was most extreme. He greatly feared “the amazing violence, and turbulence of the democratic spirit.”<sup>4</sup> James Madison wrote in regret of “the unsteadiness and injustice with which a factious spirit has tainted our public administrations,” tracing to this cause the responsibility for many of the misfortunes suffered by society.<sup>5</sup> Washington, even-tempered, sagacious, and loyal to the highest interests of his country, in his Farewell Address warned his listeners “in the most solemn manner against the baneful effects of the spirit of party, generally.” He said further:

The alternate domination of one faction over another, sharpened by the spirit of revenge natural to party dissension, which in different ages and countries has perpetrated the most horrid enormities, is itself a frightful despotism. The disorders and miseries which result gradually incline the minds of men to seek security and repose in the absolute power of an individual; and sooner or later the chief of some prevailing faction, more able or more fortunate than his competitors, turns this despotism to the purposes of his own elevation, on the ruins of public liberty. The common and continual mischiefs of the spirit of party are sufficient to make it in the interest and duty of a wise people to discourage and restrain it. It seems always to distract the public councils and enfeeble the public administration. It agitates the community with ill-founded jealousies and false alarms, kindles the animosities of one part against another, foment occasionally riots and insurrection. It opens the doors to foreign influence and corruption, which find a facilitated access to the government itself through the channels of party passions.<sup>6</sup>

Does this mean that political parties are to-day inimical to the interests of good government? By no means. Hamilton, Madison, and Washington did not foresee the extension of the suffrage to include practically all adults, thus making political parties necessary as a means of organizing and expressing public opinion,<sup>7</sup> nor

<sup>3</sup> A. Lawrence Lowell, *The Government of England* (New Ed., 1919), I, 436.

<sup>4</sup> See his speech in the Constitutional Convention, June 6, 1787, in Madison’s *Journal*: U. S. House Document No. 398, 69th Cong., 1st sess., 215 ff.

<sup>5</sup> Cf. *The Federalist*, No. X.

<sup>6</sup> J. D. Richardson (ed.), *Messages and Papers of the Presidents*, I, 219.

<sup>7</sup> Voting in the American colonies was highly restricted even after the Revolution. Cf. A. E. McKinley, *The Suffrage Franchise in the Thirteen English Colonies in America* (1905), *passim*.

did they believe that parties could substitute peaceful methods for violence and force which had characterized the democracies of antiquity.<sup>8</sup> (Parties have become definitely essential to popular government. Among other things, they perform the following important functions: (1) *Develop and maintain a sense of national unity.* The major parties overleap state boundaries and claim adherents from all parts of the country. Sectionalism to a large extent gives way before the more engrossing and dramatic issues of national politics. The population is fused into one large mass of citizenship. Racial and religious barriers are broken down, and the common interests of members of the same party emphasized.<sup>9</sup> As Bryce has remarked, the party system is "the best instrument for the suppression of dissident minorities yet devised."<sup>10</sup> It serves the purpose of conciliating numerous small groups and presenting to the voters broad, general issues upon which they can successfully pass. (2) *Coördinate the branches of government.* The elaborate system of checks and balances found in our national and state constitutions was devised at a time when governments were feared, with a view to dividing their powers so as to prevent tyranny. The result was a constitutional impasse, with the branches of government pulling against one another rather than coöperating to perform a unified task.<sup>11</sup> Fortunately parties appeared at the time when the functions of government were increasing and afforded a means of overcoming the negative defects of written constitutions—they supplied an extra-constitutional correlating agency by introducing party leadership and party discipline. At the present time the executive and the legislature do not generally stand isolated and opposed, but more often they are to be found striving for the accomplishment of the same policy under the aegis of the common party in power.<sup>12</sup> (3) *Minimize the clash of economic interests.* The demands of various economic groups find expression in party platforms only after due modification to meet the reasonable requirements of other interested groups. The result is moderation and compromise. While this frequently prevents clear-cut issues and encourages "straddling," it has the advantage of excluding from American politics the baneful influences of radicalism which have almost made popular government impossible

<sup>8</sup> Cf. Charles E. Merriam, *American Political Theories* (1903), 99-100.

<sup>9</sup> Henry Jones Ford, *The Rise and Growth of American Politics* (1898), 306-08.

<sup>10</sup> *Modern Democracies* (1921), II, 44.

<sup>11</sup> Cf. Bryce, *American Commonwealth* (New Ed. 1922), I, 283-292.

<sup>12</sup> Bryce, *Modern Democracies*, I, 115-16.



in Europe.<sup>13</sup> (4) *Permit the electorate to function.* Democracy has been possible because the great mass of citizens have been organized in a few large groups, rather than each individual trying to go his own way. This latter course would have resulted in anarchy. Parties have facilitated the participation of the voter in government and have made possible a degree of popular control. They have submitted candidates for popular choice and have presented broad issues to be decided by the people. Under the two party system found in Great Britain and the United States, the party in power is held accountable for its acts through the criticism of the party of the opposition. In spite of the imperfections of such a scheme, involving as it does numerous compromises and adjustments to the actualities of national life, it makes possible what has often been described as a government of public opinion.<sup>14</sup>

But what is public opinion? How does it come into being and how does it manifest itself? Until very recently the general tendency was to take the notion of the "general will" for granted, but to-day careful students of government are inquiring into the psychological character of crowd activity with a view to determining the factors which control group behavior. It is known that the electorate does not always vote in a purely rational manner but that emotional elements enter into the process to complicate it and make for unexpected results.<sup>15</sup> The electoral crowd thinks in terms of stereotypes or images rather than in terms of abstract issues or principles. It is therefore the party which can grip the imagination of the voters by resorting to the well-recognized laws of advertising which will have the greatest chance of victory.<sup>16</sup> The party which has the greatest sum of money to spend on propaganda is the one which enjoys the advantage in the campaign.<sup>17</sup> Public opinion does not spring spontaneously from the carefully reasoned and wise conclusions of the sovereign voter so much as it is manufactured by party leaders and popularized by the press, the advertising boards, and the radio. The protection of the sources of opinion forms one of the basic problems of democracy.<sup>18</sup> The matter is complicated further by the fact that

<sup>13</sup> Edward M. Sait, *American Parties and Elections* (1927), 163-64.

<sup>14</sup> Cf. A. Lawrence Lowell, *Public Opinion and Popular Government* (1913), *passim*.

<sup>15</sup> Graham Wallas, *Human Nature in Politics* (1909), *passim*.

<sup>16</sup> Walter Lippmann, *Public Opinion* (1922), Pt. III.

<sup>17</sup> Cf. Bryce, *Modern Democracies*, II, 477-488.

<sup>18</sup> Walter Lippmann, "The Basic Problem in Democracy," 124 *Atlantic Monthly*, 616-626.

our society has become so intricate and highly organized in the present era of big business, impersonal relationships, and intense competition. More than one reliable student of the situation has deplored the submergence of the public in the maze of complications of our modern life. John Dewey, for example, declares that the public is lost; if it exists at all, "it is surely as uncertain about its whereabouts as philosophers since Hume have been about the residence and make-up of the self." He urges that the solution is the revival of our community life, wherein true democracy, the individual in association with his fellows, can find expression.<sup>19</sup> Walter Lippmann says that government is not the creature of public opinion, as the term is commonly conceived, but of certain influential persons, the "insiders." At various times certain of the "outsiders" may intervene to hold public officials in check or to supersede them entirely. Each problem before the country has its own group of executives within the government interested in its solution and its public of interested "outsiders." Only rarely does the general public become involved. In fact, there are many publics, making what is called "public opinion" a meaningless phrase.<sup>20</sup> Experience shows undoubtedly that the functions which the electorate may properly exercise are necessarily limited in scope. The Jacksonian doctrine that the work of the government can be conducted by any group of citizens (provided, of course, they are orthodox in political persuasion), no matter what their qualifications may be, has been definitely repudiated now that tasks performed by public agencies have become so technical in character.<sup>21</sup> The concomitant of this theory, that the public can decide any issue no matter how extensive its ramifications, also rests on a false premise. As the electorate has increased in numbers and a lower intellectual standard has been introduced, the problems of government all the while becoming more difficult, it is imperative that the inherent limitations of the voters *en masse* be recognized and that the duties assigned to them be such as they can discharge effectively. President Lowell states the matter strikingly as follows:

It has been suggested as an explanation of the selection of administrative bodies in Athens by lot, that any ordinary Athenian citizen was

<sup>19</sup> *The Public and Its Problems* (1917), *passim*. See also, M. P. Follette, *The New State* (1918), *passim*.

<sup>20</sup> *The Phantom Public* (1925), *passim*.

<sup>21</sup> For sketch of principles of Jacksonian Democracy, see Merriam, *op. cit.*, Ch. V.

competent to judge whether a trireme was seaworthy and properly provided with oars, sails, arms, and provisions. But the ordinary man to-day, or the ordinary member of Congress or of Parliament, is wholly unable of his own observation to form an opinion of any value on the condition of the hull, machinery, or armament of a battleship. In the same way any sensible Yankee farmer who found himself two hundred years ago on a committee intrusted with the care of the schools in his town might be capable of knowing whether the little red schoolhouse was properly built and whether the teacher was qualified to teach the three R's; while the best equipped member of a school board in a large city at the present time is unfit for his office if he attempts to decide questions either of schoolhouse construction or of education without the aid of expert advice.<sup>22</sup>

The general public can be trusted to formulate sound judgments only on broad questions involving matters of moral principle and actual experience. It can serve as the final judge of issues and candidates submitted by the parties. But at best, its choice is a narrow one; it is obliged to answer "yes" or "no" to the propositions propounded by the parties; it cannot offer substitutes or alternatives.<sup>23</sup>

These facts being true, it is perhaps more accurate to speak of our government as being one of party opinion than one of public opinion. This is especially true when we consider the disorganized condition of the public at large, the fact that there are, in fact, many publics, each seeking to gain its own ends against the others; whereas, parties are definitely and permanently organized with certain persons in control and advocating, more or less consistently, well-known principles. It is the parties which serve as brokers of ideas, which formulate issues, which submit their official nominations to the voters, and which run the government. While it is true that such issues are not always clear-cut or the policies of candidates fully determined at the time of the campaign, there is much less uncertainty about the matter than if parties did not exist. They at least serve as a general guide to an otherwise dismayed and lost public.<sup>24</sup> The public will can best express itself and make itself effective by placing on the parties, as such, full responsibility for the conduct of government. This involves abandoning the fallacious notion that the body politic can elect all the officials, or any considerable part of them. The average citizen has

<sup>22</sup> *Public Opinion*, 47.

<sup>23</sup> *Ibid.*, Ch. IV.

<sup>24</sup> *Ibid.*, Chs. V, VI. Also, A. N. Holcombe, *The Political Parties of Today* (1925), Ch. I.

neither time, patience, nor ability to exercise a wise choice among dozens of candidates. He either votes blindly, or what is more common, votes the straight party ticket. The remedy for this situation is the short ballot, which places accountability squarely upon the party. This simply means that the voter will cast his ballot for the more important office-holders—the chief executive official or officials and the legislators. There is nothing radical about this plan; it is now followed in national elections, the voter doing no more than to elect the President and Vice-President, the Senators and Representatives. Remaining offices, administrative and judicial, are filled by appointment upon principles of merit.<sup>25</sup>

## II. THE EVOLUTION OF AMERICAN POLITICAL PARTIES

The character of American parties can best be understood by reviewing briefly their origin and development. For the sake of convenience, party history may be divided into the following periods: (1) The Federalist-Republican Alignment (1789-1816); (2) The Period of Party Fusion (1816-1832); (3) The National Republican (Whig) and Democratic Alignment (1832-1860) (4) Republican Supremacy (1860-1884); (5) Democratic-Republican Rivalry since 1884.

We are not concerned with party conditions in the colonies prior to the Revolution. These appeared primarily as factions—the most common division was that of the popular assembly against the royal governor.<sup>26</sup> Party organization, however, owes much to the beginnings made during these early times, party committees and the caucus, for instance, having their roots in the practices of the colonists.<sup>27</sup> The Revolutionary War brought forth sharp divisions between the Loyalist Tories and the Patriot Whigs, the former espousing the cause of England and the latter the cause of the American war party. As the revolutionary spirit was extended, the Tories were obliged to flee or to remain silent.<sup>28</sup> There thus resulted one party, which prevailed to the end of the War. It was during the Revolutionary period that the Americans found occasion to develop party organization further, particularly

<sup>25</sup> On evils of long ballot and merits of short ballot, see Sait, *op. cit.*, 531 ff.

<sup>26</sup> Edgar E. Robinson, *Evolution of American Political Parties* (1924), Ch. I.

<sup>27</sup> Ford, *op. cit.*, 7-10.

<sup>28</sup> C. H. Van Tyne, *The Loyalists in the American Revolution* (1902), *passim*.



in perfecting the committee of correspondence, the caucus, and the local convention.<sup>29</sup> The common cause which the colonies had taken against the mother country was enough to hold them together as long as the armed conflict continued, but when peace was restored the states asserted their "sovereign rights." The most dangerous jealousies and rivalries arose among them, and the more far-sighted leaders recognized the necessity of establishing a stronger central government than the Articles of Confederation adopted in 1781 had proved to be. The commercial and landed interests were especially concerned over the depreciation of the currency, the tariff wars, the instability of property interests, and the general threat of political disintegration which marked the "Critical Period" from 1783 to 1789. It was largely through the efforts of these influential and well-to-do classes that the new Constitution was framed and adopted, it being neither the work of the "people" nor of the "states" but of a consolidated and conservative economic group, national in scope.<sup>30</sup> While lively campaigns were waged in some of the states over the question of ratification, political parties did not take form until later. The first election under the Constitution resulted in a non-partisan choice for the Presidency and Vice-Presidency. Only a small minority of the people—chiefly property holders—voted at this time.<sup>31</sup>

(1) *The Federalist-Republican Alignment (1789-1816)*. American parties actually originated during Washington's first administration under the leadership of Thomas Jefferson and Alexander Hamilton, respectively Secretary of State and Secretary of the Treasury. These two men differed fundamentally regarding the character and solution of the important problems which confronted the new government. At the basis of their divergent political philosophy was their attitude toward the common man. Jefferson trusted implicitly in the integrity, honesty, and ability of the average citizen; Hamilton said that the people were turbulent and changing and seldom judged right or determined right. Jefferson, confident as he was in the individual, opposed the extension of governmental authority; Hamilton sought to remove power as far as possible from the hands of the public, whom he feared, and favored a strong central government with wide authority. In-

<sup>29</sup> M. Ostrogorski, *Democracy and the Organization of Political Parties* (1902), II, 3-7.

<sup>30</sup> C. A. Beard, *Economic Interpretation of the Constitution of the United States* (1913), *passim*.

<sup>31</sup> C. O. Paullin, "First Elections under the Constitution," 2 *Iowa Journal of History and Politics*, 32.

volved in the latter's plans were the establishment and protection of a commercial and industrial order. The funding of the national debt, the assumption by the central government of the obligations incurred by the states during the Revolution, the creation of a national bank, the imposition of import duties were reforms which the aggressive Hamilton pushed through Congress, much to the gratification of his supporters in the more populous sections of the North and East and to the dismay of Jefferson in the cabinet, Madison in the House, and the masses in the West and South, where an agricultural economy prevailed.<sup>32</sup> Hamilton and Jefferson likewise disagreed concerning the foreign policy of their country. The former was strongly pro-British and the latter as decidedly pro-French just at the time when these two powers were at war. American sentiment was sharply divided, and it was most difficult to preserve neutrality.<sup>33</sup> For the time being Hamilton was able to prevail by securing the adoption of the essentials of his program, Washington and Congress deferring to his plans. Whatever opposition he encountered at first was poorly organized, but he soon had to confront a strongly united host under the direction of his political enemy, Jefferson. Democratic societies sprang up, pledged to promote "a real and genuine Republicanism", and became the centers of party activity during 1793-95. During the closing years of the century, cleavage between the two embryonic political groups definitely took shape. Jefferson soon formed a coalition between the great planters of the South and the back-country grain growers from Maine to Georgia,<sup>34</sup> and was able to ride into office as Chief Executive in 1800. The decline of the Federalists was hastened by the unpopularity of John Adams, who succeeded Washington; by his disputes with Hamilton, which weakened party discipline; by unfavorable reaction against the Alien and Sedition Acts; and by the failure of the party to keep pace with more liberal public sentiment, which now appeared to dominate governmental policies.<sup>35</sup>

From 1800 to 1816 the Jeffersonian Republicans controlled the government. Although it had been freely predicted that Jefferson would put into effect the radical theories which his opponents asso-

<sup>32</sup> C. A. Beard, *Economic Origins of Jeffersonian Democracy* (1915), *passim*.

<sup>33</sup> J. H. Latané, *A History of American Foreign Policy* (1927), Ch. IV.

<sup>34</sup> Holcombe, *op. cit.*, 83.

<sup>35</sup> Robert C. Brooks, *Political Parties and Electoral Problems* (1923), 83. Jefferson was not elected by the common people but by a coalition of certain groups among the governing class. Robinson, *op. cit.*, 75-76.

ciated with his name, their predictions were to suffer disappointment. As Dr. Beard has so aptly declared:

Jeffersonian Democracy did not imply any abandonment of the property, and particularly the landed, qualifications on the suffrage or office-holding; it did not involve any fundamental alterations in the national Constitution which the Federalists had designed as a foil to the leveling propensities of the masses; it did not propose any new devices for a more immediate and direct control of the voters over the instrumentalities of government.<sup>36</sup>

Such action as that taken by the administration in the passage of the Embargo and the protective tariff, the chartering of the second bank of the United States, and the purchase of Louisiana certainly cannot be described as distinctly Republican policies. They could have been owned with pride by the most conservative Federalist. In fact, the Federalist party was destroyed largely "by the success of its own principles in the hands of its opponents."<sup>37</sup> The mercantile element gradually deserted it, and the activities of certain of its leaders in the disloyal Hartford Convention during the War of 1812 discredited the party to such an extent that it could not regain the confidence of the country. It ceased to be a factor in national politics, the disappearance of party lines issuing in the so-called Era of Good Feeling.

(2) *The Period of Party Fusion (1816-1832)*. The period of 1816 to 1832, however, was marked by the most bitter personal and factional contentions. As Professor Robinson says, "Political history in these years is largely the history of accommodation, compromise, and accident."<sup>38</sup> This was a time when party leadership was in eclipse and when portentous issues were seeking formulation and expression. Among these which showed the ultimate trend of things was the question of the extension of slavery, which reared its head for a short time when Missouri was admitted to the Union, only to be put down by the Compromise of 1820. Again, there was a-brewing the problem of what to do with the common man—what should be his share in the government? The masses, largely inarticulate in the past, began to stir themselves. By the very pressure of their moral influence and by the force of changed economic and social conditions, the commonalty were rap-

<sup>36</sup> *Economic Origins of Jeffersonian Democracy*, 467.

<sup>37</sup> E. A. Stanwood, *A History of the Presidency* (1916), I, 107; T. H. McKee, *National Conventions and Platforms* (1906), 21-23.

<sup>38</sup> *Op. cit.*, 90.

idly winning the right to vote, and, guided by principles of individualism and equality, were preparing to storm the gates of political aristocracy and privilege. Politicians sought desperately to create new combinations from the new and untested materials before them. Clay, Calhoun, Crawford, Jackson, Clinton, and J. Q. Adams all drew about themselves their own personal followings, and, by dividing the vote of the country on such a basis, prevented any candidate for the Presidency in 1824 from receiving the necessary majority of electoral votes and forced the election into the House.<sup>39</sup> Adams was chosen by a vote of thirteen states, Jackson receiving the vote of seven states, and Crawford four. Henry Clay now became a member of Adams's cabinet, and the followers of these two leaders united to form the National-Republican party, favoring the establishment of a second national bank, a high protective tariff, and extensive internal improvements.

The opponents of these policies joined under the picturesque leadership of Andrew Jackson, a pioneer, Indian fighter, lawyer, legislator, and champion *par excellence* of the sturdy, honest, rough-and-ready qualities of the new West.<sup>40</sup> His political friends had not forgotten the "corrupt bargain" between Adams and Clay which had deprived their favorite of the Presidency in 1824. They now united under the name of Democratic-Republicans to emphasize their Jeffersonian policies, overthrew the domination of the Congressional Caucus, which had been controlling nominations, and, acting through the Tennessee Legislature, placed the name of Jackson before the country and won an overwhelming victory in 1828.<sup>41</sup> This result amounted to nothing short of a revolution in American politics. As Professor Channing has observed:

The election of General Jackson to the presidency was the most important event in the history of the United States between the election of Jefferson in 1800 and that of Lincoln sixty years later. Madison, Monroe, and John Quincy Adams belonged to the Jeffersonian school of statesmen who, while holding liberal views, yet represented in their education and habits of thought the older and more courtly type of which Washington was the most conspicuous example. Jackson, on the other hand, was an indigenous product of the American soil. Vigorous and absolutely without fear, he was a born leader of men.

<sup>39</sup> The vote in the electoral college was Jackson, 99; Adams, 84; Crawford, 41; Clay, 37.

<sup>40</sup> Cf. J. S. Bassett, *Life of Andrew Jackson* (1911), 2 vols., *passim*.

<sup>41</sup> The electoral college vote was Jackson, 178; Adams, 83. McKee, *op. cit.*, 25-26.



The Jeffersonian theory aimed rather at the establishment of state democracies, while Jackson's mission was the founding of a national democracy.<sup>42</sup>

While the common people elevated Jackson to office, they did not run the government after his inauguration. His executive policies were so vigorous that there was much justification for the complaint that the seat of government had been moved from the Capitol to the White House and for the appellation which his enemies devised for him—"King Andrew." His action in eliminating the office-holders of the opposition party and replacing them with loyal members of his own group, thus applying the "spoils system" to the national government on a large scale, is well known. Likewise his fight against the "monster" United States Bank, his opposition to internal improvements and to protectionism, his refusal to admit that Congress had any control over the domestic institution of slavery, and his strong stand against nullification are matters of common record, which strikingly illustrate his colorful personality and vigorous policies. He was re-elected in 1832 and was able to elevate his chosen successor, Martin Van Buren, to the Presidency in 1836. But his enemies, personal and political, beginning about 1832, formulated a coalition which was soon able to challenge the Democratic leadership, and with some success. The Whigs (for the party of opposition thus styled itself) comprised a number of varied elements—the older National-Republicans, who were outraged at the manner with which their pet policies had been dealt; nullifiers and extreme states' rights men; Democrats whom Jackson had displeased by his high-handed methods and his distribution of the patronage; and the majority of Anti-Masons, who formed the first American third party in opposition to the alleged abuses of the Masons, of which Jackson was a member, and which is remembered chiefly as being the first to use the national convention as a means of nominating candidates for the Presidency and Vice-Presidency.<sup>43</sup>

(3) *The National Republican (Whig) and Democratic Alignment, (1832-1860)*. The period of 1832 to 1860 was characterized by rivalries between the Whigs and the Democrats. Only twice during this time were the Whigs able to secure the election of their candidates—in 1840 when Harrison, and in 1848, when Taylor,

<sup>42</sup> *The United States, 1765-1865* (1896), 208.

<sup>43</sup> E. M. Carroll, *Origins of the Whig Party* (1925), *passim*. See also C. McCarthy, "The Anti-Masonic Party," *1 Am. Hist. Assn. Report* (1902), 365-574.

became President. From the beginning the Whigs had difficulty holding their party together, so diverse were its elements. Political platforms of the time were extremely evasive in their efforts to conciliate all factions within the party. The cement which joined Northern, Southern, and Western Whigs together was common opposition to Jackson; once he and his successor, Van Buren, were out of office actual differences of interest began to show themselves clearly. The planters of the South opposed policies of protection and internal improvements favored by the manufacturers and traders of the North. After Tyler, who succeeded Harrison after the latter's death, vetoed the scheme for a national bank, the party abandoned it. Likewise it became cautious and indefinite concerning the protective tariff and internal improvements. In Congress, however, it boasted the leadership of such able men as Henry Clay, Daniel Webster, and later William H. Seward and Edward Everett. For presidential candidates it was obliged to depend on men who were available because of the fact that their views on public questions—if indeed they had pronounced views—were unknown, and who had brilliant military records. This strategy worked in 1840 and 1848 but when General Winfield Scott was chosen to carry the party colors in 1852 he suffered a defeat from which the Whigs never recovered.

The Democrats were likewise non-committal concerning the policies which they advocated. Their platforms were mainly negative in character, opposing a protective tariff, internal improvements, and a national bank, and favoring strict construction of the Constitution. They, however, favored territorial expansion—"the re-occupation of Oregon and the re-annexation of Texas." As the Abolitionists injected the slavery issue into politics, the old alignments of both parties underwent transformation, readjusting themselves on a sectional basis.<sup>44</sup> For the Whigs this meant disruption. In desperation, the party leaders accepted the Fugitive Slave Law as a settlement of the controversy now raging. This served only to alienate the northern wing of the party, as did also efforts to restore harmony in the ranks by appealing to the Compromise of 1850. By 1856 the Whig party had disintegrated.

The war with Mexico, stimulated and conducted by the Democrats, added more territory to continue the struggle between the slavery and anti-slavery factions. The latter soon realized the

<sup>44</sup> Cf. Holcombe, *op. cit.*, Ch. IV. The Know-Nothing Party appeared to draw away many northern and southern Whigs. Cf. J. F. Rhodes, *History of the United States since the Compromise of 1850*, II, Ch. VII.

need for a party to carry on the work of preventing a further extension of slavery into the territories. As early as 1848 the Free Soil Party appeared to carry out the principles of the abortive Liberty Party movement of 1840 and 1844, which was unsuccessful in its abolition program. The Free-soilers were composed of "Conscience Whigs", abolitionists, and disgruntled Democrats in New York, and it stood on this platform: "No more slave states and no more slave territory."<sup>45</sup> While the Compromise of 1850 temporarily shelved the slavery question, both Democrats and Whigs endorsing it in their platforms of 1852, the issue was again before the country with the passage of the Kansas-Nebraska Bill in 1854, which repealed the Missouri Compromise and set the stage for the bitter struggle over Kansas. Anti-slavery men of all the parties now joined to form the new Republican party. It originated among the farmers of the Northwest, who realized the danger of opening their territories to a slave economy, and soon had attracted many small, independent land-holders north of the Ohio, most of the northern Whigs, Free-Soilers, and abolitionists. Fired by a crusading spirit, this coalition revealed great strength in its first campaign—that of 1856—carrying all of New England, New York, Ohio, Michigan, Wisconsin, and Iowa.<sup>46</sup> Within four years, it swept the Democrats from office and prepared the way for what has been described as the Second American Revolution.<sup>47</sup>

(4) *Republican Supremacy (1860-1884)*. The period from 1860 to 1884 was one of Republican supremacy. The election of 1860 was characterized by a split among the various elements of the Democratic party in some ways like the disaster which had befallen the Whigs at an earlier date. The Northern Democrats nominated Douglas, who announced his doctrine of popular sovereignty, that the slavery question should be settled by the white people of each territory. The Southern Democrats nominated Breckenridge, who demanded that slavery be protected in the territories by the national government. The Republicans nominated Lincoln, who asserted that the national power should be used to bar slavery from national territory. The Constitutional Unionists put out a ticket headed by Bell, who appealed for the preservation of the Union at all costs. By carrying all of the North except New Jersey,

<sup>45</sup> For party platforms 1840-1924, see K. H. Porter, *National Party Platforms* (1924).

<sup>46</sup> Cf. G. S. P. Kleeburg, *The Formation of the Republican Party* (1911), *passim*.

<sup>47</sup> C. A. and M. R. Beard, *The Rise of American Civilization* (1927), II, Ch. XVIII.

Lincoln received a majority of fifty-seven electoral votes over the combined strength of his three opponents.<sup>48</sup> This was a signal for irreconcilable disaffection on the part of the Southern States, which soon took the fatal step of withdrawing from the Union. During the Civil War, party lines practically disappeared, the Republicans even dropping their name to adopt that of the "Union" party, which had as its primary object the preservation of the American Union. The Administration, however, was not without its critics; in fact, only by exerting pressure in the border states was a sufficient majority of Congressmen favorable to Lincoln's program elected in 1862. Within the party ranks considerable opposition to the President developed, and the Democratic element united on the nomination of George B. McClellan to succeed Lincoln in 1864. It was roundly defeated, however, the Republican party organization being retained in power by nearly a half million popular majority, the radicals of the party, who had nominated John C. Frémont, finally throwing their strength to Lincoln.

The close of the war relieved the pressure which held the divergent units of the Union party together and opened the way for the reappearance of the former alignments, marked respectively by radical and conservative proclivities. The radicals gained control of Congress and ran rough-shod over President Johnson, who had succeeded Lincoln after his assassination. It was this group which pursued the notorious "thorough" policy of reconstruction in the South, which made possible the orgy of corruption and oppression which followed the war, and which forced the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments. By fastening negro suffrage on the South, the radicals hoped to perpetuate Republican control. The measure had the reverse effect, for it created the "Solid South" organized from the first against negro domination, pledged to the maintenance, first by illegal means, then by legal methods, of white supremacy.<sup>49</sup> The reconstruction question caused a revival of the Republican and Democratic parties, though the latter was for the time being almost impotent. In the campaign of 1868, the Democrats nominated Horatio M. Seymour as their standard-bearer, and in their platform arraigned the Radicals for their oppression and tyranny. But they had no chance against the popularity of General Grant, though they polled within 300,000 votes of the Republicans. Reaction against the extreme measures taken by Congress in its work of

<sup>48</sup> Cf. E. D. Fite, *The Presidential Campaign of 1860* (1911), *passim*.

<sup>49</sup> Sait, *op. cit.*, Ch. II.



reconstruction led a group of liberal Republicans to nominate Horace Greeley for the Presidency in 1872. This group of reformers advocated general amnesty, civil service laws, specie payments, and a revenue tariff. The Democrats accepted both the platform and the candidate of the liberals; but Grant was re-elected overwhelmingly, his majority being 750,000. Greeley carried only seven border and southern states. It was during this election that the Prohibition party first appeared, and it continued its work for social reform down to the time of the adoption of the Eighteenth Amendment.<sup>50</sup>

Grant's second administration was characterized by corruption and lawlessness which discredited the entire Republican administration. The public reacted unfavorably against the Salary Grab, the scandals of Credit Mobilier, and the abuses of the Whiskey Ring. The Democrats won a majority of seventy in the House in the elections of 1874. Early in 1876 a number of Republicans determined to purge their party of its evil influences, aiding in the nomination of Rutherford B. Hayes, a foe to corruption and a friend to civil service reform. The Democrats nominated Samuel J. Tilden, former governor of New York, who had made a splendid record as a courageous and successful reformer. The Democratic nominee received a majority of the popular vote and 184 electoral votes without dispute. Hayes received 163 electoral votes. The electoral count in four of the states was in dispute, and Congress appointed an Electoral Commission to determine the outcome, it being composed of five Senators, five Representatives, and five Justices of the Supreme Court. By a strictly partisan count of eight members to seven, the Commission decided the contest in favor of the Republicans, throwing barely enough electoral votes to Hayes to cause his election. President Hayes proved to be an able, conciliating leader. He became noted especially because of his action in withdrawing Federal troops from the South, because of his efforts in behalf of civil service reform, and for his independent course, regardless of party advantage.<sup>51</sup> The supremacy of the two major parties was challenged during the election of 1876 by the appearance of the Greenback party, which emphasized the growing class-consciousness and the importance of economic issues following the war. Gaining its support chiefly from the farmers of the West, it insisted on the increase of paper money

<sup>50</sup> Cf. E. H. Cherrington, *The Evolution of Prohibition in the United States of America* (1920), *passim*.

<sup>51</sup> Robinson, *op. cit.*, 184-94.

as a solution of the pressing money-problems which confronted the country. The disaffection which it portended found fuller expression in the Populist movement, which reached its height in 1892 by securing 22 votes in the electoral college, and which demanded free and unlimited coinage of silver, the increase of the circulating medium to at least \$50 per capita, a graduated income tax, postal savings banks, government ownership of railways, telegraphs, and telephones, and other innovations.<sup>52</sup> From 1876 to the present day, economic issues came to play a greater part in political campaigns, responding to the enormous changes wrought by the introduction of the factory system and its corollaries of large scale production, urbanization, corporate organization on a national scale, and impersonal relations of employer and employee. Under the pressure of such new conditions, the rôle of government changed from that of a mere policeman to that of a public servant, with greatly expanded functions. The nature of the powers and duties of the state—more specifically, the action which the government should take in connection with each problem before the country, became the subject of the liveliest contention on the part of interested groups.<sup>53</sup>

(5) *Democratic-Republican Rivalry since 1884.* The Democratic party, which had been discredited but not entirely disrupted by the war, gradually regained its strength, and as a result it was able to secure the election of Grover Cleveland to the presidency in 1884. From this date onward, the alignment between the two major parties rested on the newer issues. The intensity of rivalries within the parties and the necessity of conciliating as many groups as possible led to much straddling and equivocating. Until 1887, for example, the two parties refused to commit themselves definitely on the tariff question. Cleveland's declaration that the protective system was "vicious, illegal, and inequitable", caused the Republicans to become its uncompromising champions in 1888, the latter winning 233 electoral votes to 168, though receiving a smaller popular vote than the Democrats. Reaction against the high McKinley Tariff passed by the Republicans soon developed, however, and aided the Democrats to elect Cleveland in 1892 to serve a second term. Meanwhile the money problem took definite form, owing to the panic of 1893, the repeal of the silver-purchase clause of the Sherman Act, and a recrudescence of agrarian dis-

<sup>52</sup> A. C. McLaughlin and A. B. Hart, *Cyclopedia of American Government*, II, 348; III, 74.

<sup>53</sup> Cf. Beard, *Rise of American Civilization*, II, Ch. XX.

content similar to that evidenced in the ranks of the Greenback party. The free silver wing of the Democratic party, under the leadership of W. J. Bryan, gained control of the Chicago convention of 1896, and secured the adoption of a platform which declared that the money question was of paramount importance, demanded the free and unlimited coinage of gold and silver at the ratio of 16 to 1, favored stricter control of trusts and railways, and urged Congress to take the appropriate action to overrule, so far as was possible, the recent decision of the Supreme Court declaring the income tax law invalid. The Republicans stood for "sound money" and for the "full dinner pail." Aided by the shrewd Mark Hanna, McKinley, the Republican nominee, was able to bring the commercial and manufacturing interests squarely to his support, while Bryan made his appeal chiefly to the class-consciousness of the laborer, debtor, and common citizen. The result was an overwhelming victory for the Republicans and an eventual readjustment of party strength much to the detriment of the Democrats, who gained in the West but lost valuable strongholds in the East, Delaware and New Jersey being driven from the Democratic ranks, and New York falling into the doubtful column.<sup>54</sup> The campaign of 1900, in which Bryan again confronted McKinley, was waged principally on the issue of "imperialism" following the acquisition of territory after the Spanish-American War. But McKinley won by a larger electoral and popular vote than in 1896. Likewise the Democrats were unsuccessful in 1904, when they nominated the conservative Alton B. Parker to oppose the popular and aggressive Theodore Roosevelt, the latter having become President following the death of McKinley. The same was true in 1908 when Bryan, ever-hopeful of securing his coveted goal, ran against William Howard Taft.

The long lease on authority which the Republicans had enjoyed had made them confident, over-conservative, and unresponsive to the demands of the rank and file of the party. Discontent arose. The farmers of the West challenged the right of the money power of the East to dominate the party. While Roosevelt remained in control, schism was averted, owing to his unrelenting warfare on privilege in all its forms. The Taft administration, however, turned the insurgents definitely against their party. The Payne-Aldrich tariff failed to meet the demands of the West; the Canadian reciprocity agreement was thought to endanger the interests of the

<sup>54</sup> A. M. Schlesinger, *Political and Social History of the United States, 1829-1925* (1925), 397-405.

farmers along the frontier. Taft was criticized for his appointments to the new Court of Claims and to the Supreme Court. A revolution broke out in 1910 against the "reactionary" and "stand-pat" Republicans who controlled Congress. A fusion of Democrats and insurgent Republicans ousted Speaker Cannon from the Committee on Rules, and in the November elections the Democrats gained control of the House. Early in 1911, Senator La Follette of Wisconsin organized the National Progressive Republican League, which severely criticized the recent legislation dealing with the tariff, banking, trusts, and conservation, and announced a thorough-going program of reform. Although Roosevelt refused at first to identify himself with this new movement, he soon indicated his support of the progressive program, and following a temporary breakdown of La Follette's health, announced his readiness to enter the pre-election campaign against Taft. In twelve states where presidential primaries were held, Roosevelt was the overwhelming popular choice of the Republican voters. The convention held in Chicago in June, 1912, however, was dominated by the Taft organization, which nominated him on the first ballot. This led to a revolt on the part of the supporters of Roosevelt, who withdrew and called for a meeting of the Progressive group to be held in August. Roosevelt and Governor Hiram Johnson of California were named as the standard-bearers of the new "Progressive party," and a remarkable platform was adopted, which advocated such political reforms as the direct primary, the short ballot, the initiative, referendum, and recall in the states, the recall of judicial decisions; such economic reforms as tariff revision by an expert commission, and the valuation of physical property of railroads; and such social reforms as the eight-hour day, the prohibition of child labor, and measures to prevent occupational accidents and diseases. The regular Republican program made some concessions to the more liberal spirit of the day, including planks favoring labor legislation, the creation of a Federal Trade Commission, the investigation of the high cost of living, and improvement of agricultural credit methods; but it rested on a relatively conservative basis, reaffirming the protective tariff policy and denouncing the recall of judges. With this division in the Republican ranks, the Democrats had a long-sought-for opportunity. Their convention was held at Baltimore late in June. The chief candidates for the nomination were Champ Clark, of Missouri, former Speaker of the House of Representatives, and Woodrow Wilson, Governor of New Jersey. On the tenth ballot, Clark polled a majority of



votes but could not muster the necessary two-thirds required to nominate. W. J. Bryan threw his support to Wilson, declaring that Clark was the choice of the reactionaries and special interests. After a struggle lasting seven days, Wilson was nominated on the forty-sixth ballot. The platform asserted that the federal government had no right to impose a tariff except for revenue purposes, denounced abuses arising from monopolies and trusts, favored the valuation of public utilities by the Interstate Commerce Commission, maintained that labor unions shall be exempted from the provisions of anti-trust laws, insisted that the President should be eligible for only one term, and proposed a number of other reforms. In spite of the lively campaigning of Roosevelt, the election was comparatively quiet. The divided opposition easily made the Democrats the victors. Wilson carried forty of the forty-eight states, Roosevelt carried six, and Taft, two, but the Democrats received only 41.8 per cent of the popular vote. The Socialist vote was surprisingly large, being 931,132 in 1912 as compared to 434,618 in 1908. The Democratic success was a victory for progressivism, resulting in the enactment of such well-known measures as the Federal Reserve Act, the Underwood Tariff, the Federal Trade Commission, the Clayton Anti-Trust Act, the La Follette Seamen's Act, and other laws. With the outbreak of the European War in 1914, Wilson called upon his countrymen to maintain strict neutrality, but from this time onward our foreign relations were destined to overshadow all domestic issues. The Mexican situation led the President to use forceful measures against Huerta, who soon fled the country. Subsequent developments in Mexico raised serious difficulties for the United States government, leading to much criticism of the party in power.<sup>55</sup>

The Democrats renominated Wilson as their candidate in 1916, and the Republicans, forgetting the party cleavage of the last campaign, joined in supporting Charles Evans Hughes, formerly a Justice of the United States Supreme Court. The platforms of the two parties dealt with such subjects as Woman Suffrage, Mexican Relations, Neutrality, Preparedness, the Tariff, the Adamson eight-hour law for railway trainmen, and kindred current issues. The Republicans condemned, the Democrats defended, the acts of Wilson's first administration. The election was close, Hughes receiving 254 electoral votes to Wilson's 277, the popular vote for Hughes being 8,547,328 and for Wilson 9,129,269. The entrance of the United States into the War in April, 1917, tended to break

<sup>55</sup> Schlesinger, *op. cit.*, 463-476; Holcombe, *op. cit.*, Ch. IX.

down party opposition to the administration, both Democrats and Republicans temporarily uniting in the common cause of crushing the enemy. In October, 1918, however, Wilson took a step which has been regarded as the turning point in his career. He appealed to the country to return to both houses of Congress a Democratic majority, giving for his reason the need for unity of command in the President, which could be secured only by having members of his party in the majority in the legislative branch. The Republicans now turned upon him, declaring that this utterance imputed disloyalty to them and showed the intention of Wilson to assume dangerous powers. The result was that the Republicans gained control of the House by a majority of forty-six votes and the Senate by one vote. From this event to the fatal dénouement of 1920, Wilson's leadership declined. His espousal of the League of Nations met withering disapproval in the Senate, opposition leaders seizing the opportunity to make political capital of every possible weakness of the Treaty of Versailles, which had incorporated the League organization and program. The Foreign Relations Committee, headed by Senator Lodge, recommended ratification only on condition that sweeping reservations be adopted. These in Wilson's opinion amounted to a complete repudiation of the principles which he advocated. Seeing the impossibility of compromise, he declared in his Jackson Day address of January 8, 1920, that the best way out was to submit the issues involved to the people in the next general election. Confident that public opinion would vindicate him, he called for "a great and solemn referendum, a referendum as to the part the United States is to play in completing the settlements of the war and in the prevention in the future of such outrages as Germany attempted to perpetrate."<sup>56</sup> But it was impossible at this time to have a referendum on this one question; too many other issues, sentiments, and prejudices intervened to permit a clean-cut decision by the electorate on the matter of our entering the League.<sup>57</sup> General reaction had set in against restrictions on personal rights occasioned by the war; grave industrial unrest confronted the country; the old fight between "wets" and "drys" was revived; disillusionment came in the tracks of peace. The people desired to forget their recent distress, to allow their tense nerves a rest. They wanted, as Harding correctly diagnosed their needs, a "return to normalcy." It was on the wave of this popular demand that the Republicans rode into

<sup>56</sup> *Messages and Papers of Woodrow Wilson*, II, 1161.

<sup>57</sup> Lippmann, *Public Opinion*, 194-95.

power in 1920. Harding, who was the fourth man in the race for the nomination at the beginning, proved a safe and available "black-horse", personifying all the conservative traditions of the Old Guard. He successfully straddled the League issue by favoring an "association" of states, purged of all the dangers of the impossible Democratic plan. Governor Cox of Ohio was nominated by the Democrats and stood not too firmly on a platform embodying the Wilsonian principles. The result was a landslide to the Republicans. Harding and Coolidge received 16,152,200 votes, while Cox and Franklin Roosevelt received 9,147,363. The electoral vote was 304 for the Republicans and 127 for the Democrats.<sup>58</sup>

The Republicans proceeded to deal with a number of problems. At the recommendation of President Harding, a budget system was adopted. Pressure exerted by the "farm bloc" in the Senate led to the revival of the War Finance Corporation to assist in financing the exportation of farm products, to the extension of agricultural credits, to the regulation of packing houses and commission merchants, to the prohibition of speculation in grain futures, and to the legalizing of coöperative associations. The Fordney-McCumber tariff act was passed in 1922, the highest protective measure in the history of our country. Under the circumstances, it might have been supposed that Republican "prosperity" would carry all before it and that only a minimum of complaint would be raised. However, there was considerable disaffection, which increased as the campaign of 1924 approached. The West was not satisfied with the manner in which the administration had dealt with its problems, the farmers suffering from the depression which sent prices down. Harding's death and the succession of Coolidge could not prevent a thorough airing of irregularities in the conduct of the government, including the Veterans' Bureau, and the Navy, Interior, and Attorney General's Departments. Coolidge met the issue with characteristic calm, and this ultimately won for him the full confidence of his party, which nominated him to succeed himself. The more radical elements of the country united with Senator La Follette in an effort to form a new "Progressive party." The convention held in Cleveland during July nominated Mr. La Follette as the candidate of the projected reform group, and adopted a program assailing private monopoly, deploring the distress of American farmers and promising relief,

<sup>58</sup> Cf. Holcombe, *op. cit.*, Ch. X; W. S. Myers, *The Republican Party: A History* (1928), and F. R. Kent, *The Democratic Party: A History* (1928). See also C. A. Beard, *The American Party Battle* (1928), 134-149.

insisting on tax reduction (and at the same time compensation to war veterans), demanding the abolition of injunctions in labor disputes, and containing other proposals sufficiently progressive to attract the endorsement of the Socialist party, the Farm-Labor party, the American Federation of Labor, and the like. The Democrats, after a hectic convention held in New York and lasting some two weeks, during ten days of which a deadlock existed between Governor Smith of New York and former Secretary of the Treasury McAdoo, nominated John W. Davis, a New York corporation lawyer and former ambassador, and Charles W. Bryan, brother of W. J. Bryan, for President and Vice-President respectively, on the one hundred and third ballot. In an apathetic campaign, during which the radio was used for the first time, the Republicans won by the following vote: Coolidge 379, Davis 139, La Follette 13, the last-named carrying only Wisconsin. A rise in the prices of wheat, corn, and live stock alleviated the farmers' suffering and this redounded to the advantage of the Republicans. The Democrats were unable to heal the wounds of the New York convention. The country, by a vote of 54 per cent of the people, decided to adopt the advice of the Republican leaders and "Keep Cool with Coolidge."<sup>59</sup>

The campaign of 1928 was one of the most lively in recent times. In their convention held in Kansas City beginning June 12, the Republicans nominated Herbert Hoover, Secretary of Commerce, for the presidency, and Senator Charles Curtis, of Kansas, for the vice-presidency. The Democrats, meeting at Houston June 26 named Governor Alfred E. Smith, of New York, and Senator Joseph T. Robinson, of Arkansas, as their standard-bearers. The platforms dealt with the power problem, with labor problems, with taxation, the tariff, transportation, and other economic questions, with agriculture, international relations, and the like, presenting policies mainly in vague, ambiguous, or general terms.<sup>60</sup> In the campaign, however, some rather clear-cut issues were presented to the electorate. Although the Democratic platform dismissed the prohibition question by merely pledging "the party and its nominees to an honest effort to enforce the Eighteenth Amendment and all laws enacted pursuant thereto", Mr. Smith announced that he favored an "amendment to the Eighteenth Amendment which would give to each individual State itself, only after ap-

<sup>59</sup> Cf. C. A. Beard, *American Government and Politics* (5th Ed.), 149-50.

<sup>60</sup> For Republican platform see, *New York Times*, June 15, p. 8; Democratic platform, *ibid.*, June 29, p. 5.



proval by a referendum popular vote of its people, the right, wholly within its borders, to import, manufacture, or cause to be manufactured, and sell alcoholic beverages, the sale to be made by the State itself, and not for consumption in any public place," without permitting the return of the saloon. Mr. Hoover stated that he did "not favor the repeal of the Eighteenth Amendment," but stood "for the efficient enforcement of the laws enacted thereunder." Both candidates promised relief for the farmer, both declared for government economy and endeavored to show how their respective parties would insure it. Smith endeavored to win the support of the East and North, recovering the losses of Bryan in 1896, by declaring against any general downward revision of the tariff and in favor of allowing an expert commission to study and solve the problems incident thereto. He opposed allowing private monopolies to secure permanent control over water power sites in the United States, standing out for Government control, a proposal which his opponents branded as "state socialism." Both candidates opposed materially changing the immigration exclusion acts, though they recognized that certain inequalities should be remedied. Likewise both deplored any religious question which might be introduced.<sup>61</sup> The campaign was notable especially for the attention given to the prohibition question, for the fact that Governor Smith's religion was the subject of much discussion, for the extensive use of the radio by the candidates, for the enormous amounts of money available and expended by both parties, for the widespread interest taken in the campaign, and for the staggering defeat suffered by the Democrats. Hoover and Curtis carried forty states; for the first time since the Civil War the Solid South was invaded, Texas, Florida, Virginia, and North Carolina voting Republican. Governor Smith lost his own state of New York but invaded the Republican strongholds of Rhode Island and Massachusetts. The electoral vote was Hoover, 444; Smith, 87. The estimated popular vote was Hoover, 20,000,000; Smith, 14,500,000.<sup>62</sup>

From the beginning of the American party battle, the war has raged mainly over the distribution of property. The alignment of the various economic groups has been determined by this factor. It is not generally recognized that the tariff, the currency, banking, taxation, the immigration policy, the merchant marine, the foreign

<sup>61</sup> For excerpts from statements giving their opinions on the issues of the campaign, see *New York Times*, November 4, 1928, Sec. 10, p. 1.

<sup>62</sup> *Ibid.*, November 8, 1928, p. 1.

policy of the nation, and the transportation system of the country are instrumentalities which a party may use in its administration of the government to further the economic interests of its groups. It is undoubtedly true that the tariff by stimulating production and guaranteeing a market to the protected articles has greatly increased the wealth of certain groups and incidentally of the nation. The question arises whether this system has not worked at the expense of other groups who share less extensively and only indirectly in the wealth thus produced.

The Greenback and Free Silver groups aimed at the distribution of goods in their favor. Cheap money is always in the interest of the debtor class. It is a means of partial repudiation. It takes from him that has and gives to him that has not. Also a liberal immigration policy benefits the employer of labor at the expense of the employees. The foreign policy of the government may be a great benefit to the investor in foreign securities. The opening of China and Japan, the acquisition of foreign possessions, the digging of canals, and even rank intervention are examples from our own foreign policy.

While emotionalism, prejudice, and sectionalism have been factors in this more than century-old contest, it is a great mistake to conclude that politics is "mere sound and fury, a futile game in which the prime consideration is to get the right man and the right slogan."<sup>63</sup> Party leaders do not sit down and work a clear-cut ideal for a nation. It is useless to do it. They must have the support of the controlling groups of society to stay in power. Jefferson dreamed of a simple agrarian society with a system of public schools from the primary to the university, with an inexpensive government, and with complete freedom from "the mobs of the great cities" of an industrial society. This was a beautiful dream but only an absolute government, wholly foreign to Jefferson's political theory, could have realized it, if indeed realization of the ideal was at all possible.

The complexity of American economic life is making the game of politics increasingly difficult and hazardous. Its increasing diversity and the growing strength of its economic bosses, who demand a hearing for groups, make it very difficult to maintain party ranks. Political parties are now merely general jockeying grounds for economic interests—purely arbitral agents. The future of American political parties will depend upon a very wise leadership that can maintain harmony among these varying articulate forces.

<sup>63</sup> C. A. Beard, *The American Party Battle*, 143.

## CHAPTER X

### NATIONAL PARTY ORGANIZATION AND ACTIVITIES

"Party is as old as politics and the operation of party in working the machinery of government is seen in all countries having free institutions; but of party as an external authority, expressing its determinations through its own peculiar organs, the United States as yet offers to the world the only distinct example. . . ."  
—H. J. FORD.

#### I. THE BASIS OF POLITICAL PARTIES

Political parties have been variously defined. Edmund Burke viewed a party as "a body of men united, for promoting by their joint endeavors the national interest, upon some particular principle in which they are all agreed."<sup>1</sup> He thus emphasized the ideal or ethical basis upon which he understood such associations to rest, their purpose being to advance public, as opposed to private, welfare, and to vindicate principle rather than to carry out policy. This concept has been subject to much criticism by those who have observed the manner in which parties actually work. The realistic view is that a party is composed of individuals and groups who have combined to pursue their own particular interests, their object being to control both the policies and the personnel of the government.<sup>2</sup> Experience, it is said, shows that parties are more interested in electing candidates to office than in getting the electorate to accept any principles which they may advocate, and that platforms are merely to attract votes and not to serve as programs to which the party is solemnly pledged. The effort to win the support of diverse and conflicting interest-groups has caused the major parties to resort to conciliating, generalizing, and "straddling" in their platforms until it is difficult to determine if they stand for anything definite. The main thing is not that there are two sides to every question, but that there are two sides to every office—the inside and the outside—and that the chief concern of the party in power is to remain in control of the affairs of the

<sup>1</sup> *Works* (Bohn, 1841), I, 151.

<sup>2</sup> Cf. Holcombe, *The Political Parties of Today*, 8-10.

government, and of the party out of power to secure their control.<sup>3</sup> To accomplish either of these objectives, however, the party must be reasonably responsive to the demands of the country at large. This is especially true if it is in control of the government, for it is then held responsible for its acts and may fail of reelection if it ignores or repudiates public opinion as expressed through the press, the lobby, the host of private associations, and the hundreds of other avenues whereby the voice of the people may become articulate. Although legislation results from compromise, it represents a definite choice on the part of those who enact it. By the force of this circumstance, it frequently happens that parties are obliged to advocate principles and to be judged by the action which they have taken concerning them.<sup>4</sup> Nevertheless, as Bryce has pointed out, the chief purpose of a party is to capture, and to hold when captured, the machinery of government; to place "sound" men in office, who can be trusted to advance the cause of the party.<sup>5</sup>

What are the motives behind the conduct of individuals and groups leading them to formulate organizations of this type with a view to controlling the policies and personnel of the government? Several theories—fantastic and realistic—have been projected to explain this phenomenon. Macaulay, the English historian, explained the existence of parties on the ground that men can be separated into two opposing groups—liberals and conservatives. The former stand for progress, the latter fear it; the one desires change, the other the maintenance of the *status quo*.<sup>6</sup> Friedrich Rohmer, another writer, said that parties follow a natural law of growth, going through the cycle of boyhood, young manhood, mature manhood, and old age, beginning with radical ideas, becoming more temperate and constructive, and finally ending as reactionary.<sup>7</sup> While such reflections are stimulating, they are misleading. Macaulay's notion breaks down because all men cannot be classified into such simple groups. An individual as well as a political party may be liberal on one matter and conservative with respect to another. Further, the explanation entirely fails to account for the existence of the multi-party system in Europe or the existence of numerous interest-groups in the major Ameri-

<sup>3</sup> Cf. Sait, *American Parties and Elections*, 141-45; 459-462.

<sup>4</sup> This is true especially when the division is partisan. Also the individual records of legislators are frequently reviewed in the campaigns.

<sup>5</sup> *Modern Democracies*, II, 42-3.

<sup>6</sup> *History of England* (5th Ed.), 88.

<sup>7</sup> *Lehre von den politischen Parteien* (1844), *passim*.



can parties. Rohmer reasoned from a false biological analogy and failed to take into account the influence of economic, social, racial, religious, geographical and other factors which combine to overthrow any generalization as sweeping as the one offered. A more acceptable account of the basic forces which impel political conduct is founded on the economic interest of party members. The classic statement of this view was made by James Madison who said that

. . . the most common and durable source of factions has been the various and unequal distribution of property. Those who hold and those who are without property have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination. A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views. The regulation of these various and interfering interests forms the principal task of modern legislation, and involves the spirit of party and faction in the necessary and ordinary operations of the government.<sup>8</sup>

This doctrine frankly declares that selfishness is the motive power behind political action; that constitutional arguments, appeals to the first principles or to patriotic impulses are merely used to hide the real purpose of those in control of a party—the advancement of their own interests, economic and sectional.<sup>9</sup> While there is much truth in this theory, standing alone it fails to take into account the emotional and altruistic factors involved in political conduct. It is true that the average man will normally act in such a way as to advance his own welfare, but he may be ignorant of what action is really best to take, and the intervention of non-rational sentiments may cause him completely to ignore the immediate material ends sought. Likewise a group or a party may desire to secure a given advantage, but it may be carried away by the contagion of patriotism, of self-sacrifice, of idealism, completely forgetting the reasoned objective. If self-interest alone dictated the conduct of parties and governments, why would they continue to resort to wars, which exact tremendous losses in life and property of both victors and vanquished?<sup>10</sup> It is more often the glory of serving under the flag, the stimulus of martial music, the hope of vindicating a sacred right, the quiet memories of

<sup>8</sup> *The Federalist* (Lodge Ed.), No. 10, 54.

<sup>9</sup> Cf. C. A. Beard, *The Economic Basis of Politics* (1922), *passim*.

<sup>10</sup> Cf. Norman Angell, *The Great Illusion* (1910), *passim*.

home, the fear of foreign oppression, the hatred of the enemy race, than the mere expectation of gaining territory or booty that leads men to fight.<sup>11</sup> Political conduct is due to a number of factors, each case depending on a different combination of motives and circumstances. Men may join parties and participate in their work with a view to secure personal gain, or merely to find some means of self-expression, or to render an unselfish service to their fellow-men. No matter how complicated or inconsistent such motives may be, the more important thing is that man is a political animal. He lives naturally in association, and political parties are the most available means at hand to order, control, and direct the government which protects and serves him.<sup>12</sup>

## II. PARTY ORGANIZATION

The success of party government depends in a large manner on organization. There must be definite and permanent machinery whereby the prevailing will of the party membership may express itself and bring its influence to bear on the government. The party must act as a unit. It must go as an army into battle, with centralized command and disciplined troops. Bryce has made the matter very clear in these words:

Organization is essential for the accomplishment of any purpose, and organization means that each must have his special function and duty, and that all who discharge their several functions must be so guided as to work together, and that this co-operation must be expressed in and secured by the direction of some few commanders whose function it is to overlook the whole field of action and issue their orders to the several sets of officers. To attempt to govern a country by the votes of the masses left without control would be like attempting to manage a railroad by the votes of uninformed shareholders, or to lay the course of a sailing ship by the votes of the passengers. In a large country especially, the great and increasing complexity of government makes division, subordination, co-ordination, and the concentration of directing power more essential to efficiency than ever before.<sup>13</sup>

In the United States the desired end is obtained by what Walter Lippmann calls a "natural pyramiding of influence."<sup>14</sup> The major parties have established and maintain great hierarchies of com-

<sup>11</sup> Cf. Graham Wallas, *Human Nature in Politics*, *passim*.

<sup>12</sup> Cf. John Dewey, *The Public and Its Problems*, Ch. III.

<sup>13</sup> *Modern Democracies*, II, 546-47.

<sup>14</sup> *A Preface to Politics* (1913), Ch. I.

mittees, the ramifications of which extend into every village and precinct of the nation, but whose direction is entrusted to a relatively small group of men and women at the top of the pyramid.

(1) *The National Committee.* The central directing agency of the party is the National Committee. In both the Republican and Democratic parties it is composed of one man and one woman from each of the forty-eight states and from the District of Columbia, Alaska, Hawaii, the Philippines, and Porto Rico. The Democrats also allow representation from the Canal Zone. Positions on the Committee are filled by nominations made by the respective state delegations to the national convention and election by the convention. The state delegations are obliged to obey state laws, where they exist, or instruction from local party organizations when it is given. The chief function performed by the Committee is the supervision of the presidential campaign. With this in view, the Chairman is named by the Presidential candidate, and upon him falls the responsibility of directing the party forces toward victory. He absorbs to a large extent the powers of the Committee, becoming the actual commanding general of the campaign. He is aided by other officers—vice-chairmen, a secretary and assistant secretary, a treasurer, and an executive advisory committee, not to mention a number of bureaus and departments undertaking specialized work—but he is the one charged with determining in the last analysis the steps to be taken to secure the election of the party nominees. The National Committee is further important because it is the agency whereby the party organization perpetuates itself. Its work is continuous, involving the perennial solicitation of funds, the printing and distribution of campaign materials, the supplying of news items to the press, the constant stimulation of interest in party objectives.<sup>15</sup> It has charge of the preliminaries of the national convention. A few weeks before the convention meets, the Committee decides upon the place and time of meeting, issues the call for the convention, appoints local committees to attend to all necessary preparations, and on the eve of the meeting it makes up the temporary roll of delegates, rendering preliminary decisions in contested delegation cases. It decides upon the temporary officers of the convention, and its chairman is formally charged with calling the convention to order.<sup>16</sup>

<sup>15</sup> Sait, *op. cit.*, 292-300.

<sup>16</sup> P. O. Ray, *Introduction to Political Parties and Practical Politics* (3rd Ed.), 131, 145, 172.

(2) *Senatorial and Congressional Committees.* The National Committee also coöperates with the Senatorial and Congressional Committees of the party. While the three are distinct, they have a common objective—the election of nominees of the same party to office. As the names of the two latter committees indicate, they are concerned with the campaigns of United States Senators and Representatives, existing to aid the nominees in their campaigns. The Republican senatorial committee consists of seven members, the Democratic committee of six, being appointed by the chairman of the party senatorial caucuses. The Republican congressional committee is composed of one member from each state which has party representation in the House, nomination being by the state delegation and confirmation by the party congressional caucus. The Democrats follow a similar practice, but the chairman is empowered to appoint a woman member from each state and to fill vacancies. These committees are continually active to insure so far as possible the success of the respective party candidates in off years as well as during presidential years.<sup>17</sup>

(3) *The State Committees.* Since national parties recognize no lines on the map, their organizations include an elaborate system of principal and subsidiary committees. At the head of the list are (a) the state central committees, which are chosen in the main by direct primaries or state conventions. These vary in size from 11 in Iowa to 811 in California, and their powers and duties likewise vary from state to state. These committees perform such functions as fixing qualifications for voting in the party primaries, filling vacancies caused by death or withdrawal of party candidates, and—most important of all—taking command of the campaign within the state, raising and expending money, determining political strategy, holding political rallies, supplying speakers, distributing campaign literature, and getting out a favorable vote. As in the national committee, this work is centralized largely in the hands of the state chairman, who is aided by an executive committee. Close relations are maintained with the national party organization, and to an uncertain degree, with the local committees, which, in the majority of cases, are named independently of the state committees and may pursue their own course if they choose. Harmonious relations in the state party organization depend to a great extent on comity and the stimulus of a common cause. Below the state committee are to be found a number of subordinate or inferior committees, which vary greatly in size and func-

<sup>17</sup> Charles E. Merriam, *The American Party System* (1922), 62-63.



tions throughout the country. For example, there are (b) the district committees in some states, which concern themselves with the election of state representatives and senators and other district officials. They are of minor importance and their work is often taken over entirely by (c) the county committees. These latter are made up of representatives chosen from towns, townships, from the county at large, or from wards. Because of the considerable patronage which is at the disposal of the party in control of the county, the chairman of this committee is an important personage, who wields much power in his own behalf or in behalf of some outsider to whom he is subservient. He is generally the pivot about which the local party machine revolves. A step farther down the scale are to be found (d) the ward, school, town, and city committees, whose jurisdiction extends over a limited local territory. They vary considerably in functions from one part of the country to another, and, indeed, may not exist at all, their places being taken by the county committees.

(4) *The Corner Stone of the System.* The basic unit, the "unit cell," of the party organization is the precinct committee. It is to be found in the 125,000 or more election precincts of the United States, coming directly and intimately into relations with the voters. In most of these small districts, the precinct chairman is elected at the party primary, along with the members of the committee who, in some cases, are named to serve with him. The normal practice is to have a single committeeman for each precinct. He is charged with delivering the vote of the precinct to his party, this involving a number of duties, such as: assisting aliens to secure naturalization papers, instructing and aiding voters, employing speakers, holding rallies, raising campaign funds, distributing literature, making a thorough canvass of voters, and performing innumerable other tasks. He acts as a constant friend in need to the citizen, helping him secure employment, or saying a good word to the judge concerning him when he is in trouble. By every method at hand, the committeeman gains as firm a grip as possible upon the electorate, which is supposed to remember all favors received and to show its appreciation on election day. Thus the party organization does its work. Through a great system of committees, a nation-wide federation which overleaps state boundaries, is able to keep in touch with the individual voter and to keep him interested and "regular."<sup>18</sup> The whole arrangement

<sup>18</sup> Cf. Sait, *op. cit.*, Ch. XII, Merriam, *op. cit.*, 60-70, Brooks, *op. cit.*, Ch. VIII. The Socialist party organization is made up of the dues-paying

appears as a state within a state—more properly, it is an extra-constitutional government, permanently organized, seeking to capture and control the constitutional government. That one part or another will succeed in doing this in every election serves to emphasize the importance of the organization which has been maintained. It is only through a party that the individual voter can hope to exert any influence at all upon the government.

(5) *Nominating Machinery*. The machinery which has been described may be regarded as permanent in character, existing and operating, on the whole, from year to year, though being most active during the electoral campaigns. There is a second type of party organs which are temporary—party conventions and primaries. These concern themselves principally with nominations, and to a lesser extent with the formation of platforms, the latter activity approaching in an inchoate and vague manner the legislative process.<sup>19</sup> The development of present nominating methods has been marked by numerous experiments and adaptations to the changing conditions of party life.

(a) *The Caucus*. The origin of the system is to be found in the caucus of the colonial period, which served as a means by which the patriots or Whigs concentrated their voting strength to capture elective offices, agreeing in advance on the candidates of their choice. The committees of correspondence, which appeared just prior to the Revolution, set up a nation-wide party organization, doing much to awaken the colonies to their mutual cause against the mother country, and making possible the common action leading to the calling of the Continental Congress, which became the *de facto* government under the leadership of the Revolutionary partizans. The government was at this time very irregular, nominations being made in general by groups of influential persons through so-called "parlor caucuses." With the subsequent appearance of party alignments in the states, the legislative caucus, composed of members of the party in the legislature, arose to select the candidates for the office of governor and lieutenant-governor, as well as presidential electors, and to recommend to the voters the acceptance of the full ticket. By 1800 the same device had been introduced into the national government, being known as the congressional caucus.

members of party "locals," of state committees, and of the National Executive Committee. It has paid organizers who constantly carry on a vigorous work of winning adherents. Cf. Brooks, *op. cit.*, 165-69.

<sup>19</sup> Cf. Brooks, *op. cit.*, 144.

(b) *The National Convention.* Gradually, however, owing largely to the extension of the suffrage and the growing belief that the people should participate more directly in the nomination of their candidates, the delegate convention system displaced the legislative caucus. Following the rise of the western insurgents under Jackson, the congressional caucus became completely discredited. In 1831 the Anti-Masonic party held the first national party convention, the National Republicans following this precedent the same year. While numerous abuses arose in the state and local conventions—frauds, repeating, violence, intimidation, and domination by the worst elements—leading to their abandonment in favor of the direct primary method of nominating candidates,<sup>20</sup> the convention system persists in national politics, and there is no immediate likelihood of its being displaced.<sup>21</sup>

(1) *Its Functions.* The national convention represents the supreme power within the party organization. It nominates the party candidates for President and Vice-President; it drafts and adopts the platform upon which it appeals to the country for support; it determines its own rules of procedure, elects its officers, decides contests over seats, names and regulates the activities of its permanent committees, fixes the number and apportionment of its members; and finally appoints the new national committee. Until recently the uniform practice was for delegates to be chosen by state and district conventions. Beginning in 1905 in Wisconsin a movement has swept through some twenty states with the purpose of applying principles of direct popular control over the national convention. The result has been the passage of state laws requiring either the direct election of delegates to the national convention, or the popular expression of preference for the presidential nomination, or both. Such provisions may or may not require the delegates to pledge themselves to vote for the popular choice.<sup>22</sup> The new practice necessitated some change in the rules of the two major parties. The Democratic convention, acting on the principle of states' rights, has generally done no more than fix the number of delegates from each state and territory, but in 1912 it was provided that the delegates of the next convention should be elected directly where state laws so required it, otherwise by party rule. The Republican national committee adopted a

<sup>20</sup> For a discussion of primaries, see the chapter on State Politics and Elections.

<sup>21</sup> For a comprehensive survey of these developments, see Ostrogorski, *Democracy and the Organization of Political Parties*, II, 3-197.

<sup>22</sup> Louise Overacker, *The Presidential Primary* (1926), Ch. X.

similar practice in 1916. Nevertheless, these innovations have been of little practical importance. The effort to graft the direct primary onto the national convention system has proved a failure. Lack of uniformity in the state laws and inability of Congress to regulate, the habit of states voting for their favorite sons, the refusal of candidates to offer themselves in doubtful states, the tremendous costs of the elections, and the resulting factional disturbances are assigned as some of the reasons for the unsuccessful outcome of this experiment.<sup>23</sup> To-day, in the absence of state law to the contrary, the members of the Democratic convention are chosen in three different ways—all at large by the state convention; two for each congressional district by the state convention on the nomination of the delegates of each district, and four at large by the state convention; or two for each congressional district by district conventions and four at large by the state convention. The Republicans in 1884 adopted a rule whereby delegates were to be elected by delegate conventions in the congressional districts, or by subdivisions of the state convention into district conventions. The practice adopted led to the election of delegates-at-large by state conventions, and district delegates by district conventions. In 1916 it was provided that all of the delegates of the state could be chosen at large if the state law so required.<sup>24</sup>

(2) *The Determination of the Personnel.* The apportionment of delegates to the conventions of the two major parties is determined by party rules. Before 1852 the general practice of both parties was to allow each state delegates equal in number to its Senators and Representatives. From this date to the present time the Democratic party, and from 1860 to 1916, the Republican party, have provided that the number of state delegates shall be twice that of its members in Congress. Both parties now allow one vote to each delegate. The Democrats permit the District of Columbia, Alaska, Hawaii, the Philippines, Porto Rico, and the Canal Zone to be represented in the convention. Owing to the fact that the South is solidly Democratic, the Republicans have been confronted with serious difficulties in their efforts to adjust the apportionment of delegates on the basis of congressional representation of the states, irrespective of party strength therein. For one thing, it often occurred that states which polled a very small Republican vote were allotted more delegates than

<sup>23</sup> Sait, *op. cit.*, 447-48.

<sup>24</sup> *Ibid.*, 440-42.



Republican strongholds. Again, the Southern members of the convention were generally controlled by the administration at Washington, which, through its use of the patronage, was able to dominate the proceedings and bring about the nomination of its candidate regardless of the will of the party at large to the contrary. Protests against this condition arose as early as 1860 and continued sporadically down to 1912, when the control of the Southern delegates by the Taft forces enabled them to forestall the nomination of Roosevelt. The resulting schism in the party indicated the imperative need of reform and led to a reallotment of seats for the next convention (1916), Tennessee and the Solid South losing 78. Subsequent changes were made to reconcile the various conflicting interests involved, the National Committee adopting the following arrangement in 1923. Delegates-at-large should be apportioned as follows: four for each state; two additional for each representative at large in Congress from any state; two each for Alaska, the District of Columbia, Porto Rico, Hawaii, and the Philippines; three additional for each state casting its electoral vote, or a majority thereof, for the Republican nominee for President in the last preceding election. One district delegate was allowed for each congressional district, and one additional district delegate for each congressional district casting 10,000 votes or more for any Republican elector in the last preceding presidential election or for the Republican nominee in the last preceding congressional election. The result has been to weaken southern influence to some extent, but it is still greatly out of proportion to party strength in the South.<sup>25</sup> The size of both conventions makes them unwieldy, the Republicans having 1,109 and the Democrats 1,098 present in 1924.<sup>26</sup>

(3) *Selection of the Place and Time of its Meeting.* Necessary work preliminary to the holding of the convention is done by the National Committee. It meets, usually in Washington, in December of the year preceding the election, or in January of the election year, determining the time and place of the convention. The Republicans habitually meet some time between the second and fourth week of June, and the Democrats some two or three weeks later.<sup>27</sup> The convention city is selected on the basis of its strategic location, its hotel and auditorium facilities, and its willingness to subscribe stupendous amounts of money for the use of the

<sup>25</sup> See *Proceedings of 1924 Convention*, II.

<sup>26</sup> Brooks, *op. cit.*, 277.

<sup>27</sup> In 1928 the Republicans met June 12, the Democrats June 26.

party.<sup>28</sup> The official call for the convention is also issued by the Committee at this time. It formally determines the time and place of meeting, and, conforming to party rules, fixes the number of delegates and alternates from each state and territory. The Democrats allow the method of choosing delegates to be determined by the state central committees, which act in accord with local party rules or local primary laws. The Republican National Committee exercises considerable control over this matter, the call prescribing in general terms the time and method of electing delegates and providing for the forwarding of credentials of delegates and notices of contests to the National Committee.<sup>29</sup>

Some time before the convention is held, various aspirants for the party nomination become active in the states in an effort to win the support of their respective delegations. This pre-convention campaign is often conducted in a thoroughgoing manner, and it serves to awaken the greatest interest in the possible decision to be made by the convention. When the convention does meet, the eyes of the nation are upon it. It presents a spectacle which for color, intensity, and dramatic movement entitles it justly to rank with such typically American institutions as a championship baseball game or prize fight, discharging, however, in all of its confusion, a function which must be regarded as of superior importance—the selection of one of two men, one of whom will finally be chosen President. A few days prior to the opening of the convention the city where it is to be held assumes a new aspect, with flags adorning the town and with crowds arriving from all directions. The state delegations arrive and parade the streets, where they are welcomed with shouts from the multitudes who line the sidewalks. Proceeding to their hotel where state headquarters have been established, they soon encounter every possible pressure in behalf of the rival aspirants. The lobby and the private rooms of the delegates become centers for much scheming, interviewing, caucusing, and trading with a view to securing the initial advantage in the forthcoming contest.<sup>30</sup> The opening day of the convention arrives, and the delegates and alternates find their places, assigned to each state group in advance, in the large convention hall, which is appropriately decorated with flags, bunting, and pictures of party notables. A stand-

<sup>28</sup> This is how Kansas City and Houston secured the Republican and Democratic conventions of 1928.

<sup>29</sup> Sait, *op. cit.*, 430-31.

<sup>30</sup> Cf. Ostrogorski, *op. cit.*, II, 248-279 for graphic account of the organization and work of the national convention.

ard bearing the name of the state or territory identifies its delegation in the sea of humanity which fills the hall. Space is also allotted to the press representatives, and the galleries are occupied by curious spectators, admission being allowed only to those who have been fortunate enough to secure tickets from the party leaders. At times the innocent onlookers take a hand in the proceedings, engaging in demonstrations for their favorite candidates, with more or less effect on the votes of the convention.<sup>31</sup> Sometimes these demonstrations are prearranged with a view of stampeding the convention for a certain candidate.

(4) *Its Workings.* At the appointed hour the chairman of the national committee mounts the rostrum and raps for order. Prayer is offered by a prominent clergyman, members of various sects being employed at this and subsequent sessions in order not to offend religious susceptibilities. The call for the national convention is read by the secretary of the committee. The chairman then places in nomination the temporary officers, who have been selected in advance by the committee. Such nominations are usually ratified as a matter of form, but the vote taken may sometimes become a test of strength between the dominant and opposing factions in the party. The temporary chairman now takes the platform and delivers the "key-note" speech, a flamboyant diatribe against the abuses and perversities of the other party and an extravagant panegyric on the virtues and accomplishments of his own. He attempts to sound the spirit of the occasion and to arouse the assembly to that high pitch of emotionalism which is regarded as essential to the accomplishment of the serious work before the body. He utters, or attempts to utter, the battlecry which will summon all his loyal, patriotic, and energetic cohorts to do battle against the enemy.<sup>32</sup> After being thus regaled, the convention completes its first day's work by selecting the four important committees which materially aid its future activities—the committees on credentials, on permanent organization, on rules and order of business, and on platform and resolutions. These are composed alike of one member from each state and territorial delegation. They report to the convention in the order named

<sup>31</sup> An outstanding case was the conduct of the galleries in the Democratic convention of 1924. Cf. *New York Times*, June 27, 1924.

<sup>32</sup> For a description and criticism of the office of "key-noter" see *New York Times*, June 3, 1928. For text of address of Senator Fess, the Republican temporary chairman in 1928, see *New York Times*, June 13, 1928; and of Claude G. Bowers, the Democratic temporary chairman, *ibid.*, June 27, 1928.

above, except that the committee on credentials may be delayed because of contests for seats, in which case the committee on permanent organization may be heard and the election of permanent officers take place.

The second session, and sometimes the third, is devoted to hearing and considering the reports of the committees. The committee on credentials reviews the findings of the national committee with respect to contested seats, recommending to the convention the recognition of certain delegates as regularly elected, and the rejection of others. This function is important, for it may determine the personnel of the convention, and, when groups are well-balanced, may give one an advantage which will be reflected in the platform, the nominations, and the composition of the new national committee. An outstanding example of this occurred in the Republican convention of 1912, when Taft, by gaining the sixty-two seats which were in dispute, was able to control the convention. It sometimes happens that the credentials committee will recommend a compromise, seating both contesting delegations but allowing each member only one-half vote. Generally the majority report of the committee is accepted without opposition, though the convention is free in this case, as in regard to the reports of the other committees, to accept the minority report, or to follow an independent course. The committee on permanent organization nominates a permanent chairman and other officials who serve during the remainder of the convention. Here again the report is commonly acted on favorably, but it may offer occasion for insurgents to oppose the group in power. The permanent chairman, once being elected, proceeds to deliver another "key-note" address, similar in tone and in result to that of the temporary chairman. The committee on rules reports next. It may deal with such matters as the procedure of the convention, the composition and powers of the national committee, and the apportionment of delegates. The rules of the House of Representatives are adopted as a basis of procedure by both parties. The committee on platform and resolutions reports last. Its work is accomplished after numerous hearings and after a sub-committee has drafted a tentative plan in which all important conflicting interests and points of view are conciliated. The committee is often aided by special party agencies which collect data and by the advice of astute political leaders over the country. The result is often a mere congeries of generalities, stilted, verbose, declamatory, self-righteous, yet indicating general political tendencies.



While designed essentially to catch votes, it likewise represents the general consensus of the party, though it may be dictated by the President, who usually is the effective party leader. The committee may be unable to agree, in which case a minority report may be read and debated on the floor of the convention. In the Democratic convention of 1924, the majority report favored denouncing religious intolerance, a minority desiring to name the Ku Klux Klan in the denunciation. For a time it appeared that the convention could not reconcile these two points of view, and that disruption would follow. However, the majority view was adopted by the margin of one vote.<sup>33</sup>

Having acted upon the committee reports, the convention is ready to undertake its most important and interesting work—the selection of a candidate for the Presidency. The roll is called by states, alphabetically, beginning with Alabama, and each is allowed to place its favorite in nomination. If it has no candidate, it may defer to another state farther down the list. The nominating speeches are, as a rule, extravaganzas of bombast, stimulating when delivered during the excitement of the moment, but quite amusing when read critically at a later time when the heat and expectancy and confusion no longer exist. The following extract from a speech in the Democratic convention of 1884 in behalf of Cleveland, who was nominated on the second ballot, delivered by a delegate from Wisconsin is quoted by Ostrogorski as typical:

Grim and grey, personally fighting the battles of the Democratic party, I stand to-day to voice the sentiment of the young men of my State when I speak for Grover Cleveland, of New York. His name is upon their lips, his name is in their hearts, and he is the choice not only of that band of young men, but he is the choice of all those who desire for the first time, as young men, to cast their votes in November for the candidate nominated by this convention. They love him, gentlemen, and respect him, not only for himself, for his character, for his integrity and judgment and iron will, but they love him most for the enemies he has made. . . . Every breeze brings to us what would seem to be indications of victory, but we cannot accomplish victory without recruits. Those recruits are at our bidding: young, middle-aged, and old; you see them in platoons and regiments, brigades and divisions. Every one of them bears upon its banner first "Cleveland of New York." Let the countersign of the great Demo-

<sup>33</sup> *Proceedings*, 226, 250-333. Cf. Ray, *op. cit.*, 16-27, 145-48; Sait, *op. cit.*, 453-464. For instance of conflict in Resolutions Committee, see account of the vigorous debate over Prohibition plank in 1928 Democratic Convention. *New York Times*, June 28, 1928.

cratic camp in November be "Cleveland," and then men can make their way to it, and recruited as we shall be, our Ides of November will not be a Waterloo, but will be a glorious sun of Austerlitz and Wisconsin.<sup>34</sup>

Some improvement in taste is evidenced in the later nominating addresses, which are characterized by a more objective point of view and by more self-restraint. Thus Franklin D. Roosevelt in nominating Alfred E. Smith during the Democratic Convention of 1928 undertook to analyze the qualities needed in a President at the time. He said that these were four in number: first, "leadership, articulate, virile, willing to bear responsibility;" second, "experience, that does not guess but knows from long practice the science of government;" third, "honesty that hates hypocrisy and cannot live with concealment and deceit;" finally, that rare ability to "arouse in the citizenship an active interest" in their government. He then measured Smith by these standards and found him eminently qualified, ending his very effective address with the following statement:

America needs not only an administrator but a leader—a pathfinder, a blazer of the trail to the high road that will avoid the bottomless morass of gross materialism that has engulfed so many of the great civilizations of the past. It is the privilege of Democracy not only to offer such a man but to offer him as the surest leader to victory. To stand upon the ramparts and die for our principles is heroic. To sally forth to battle and win for our principles is something more than heroic. We offer one who has the will to win—who not only deserves success but commands it. Victory is his habit—the happy warrior, Alfred E. Smith.<sup>35</sup>

The nomination is the signal for an unrestrained demonstration in behalf of the candidate. Everything has been carefully prepared and timed in advance by his leaders on the floor. At the end of the nominating address, which is usually arranged in climactic form so that the candidate's name comes last, the convention is thrown into pandemonium. Bands, which have been warned in advance, are given the signal and blare forth with the adopted music of the favorite son. Supporters rapidly fill the aisles, organizing a parade in his behalf, seizing the standards of those delegations which do not join readily, literally dragging men and women into line. In the confusion, fist fights frequently occur,

<sup>34</sup> *Op. cit.*, II, 267.

<sup>35</sup> *New York Times*, June 28, 1928.

requiring the intervention of the police. Bedlam prevails, an anomaly of democratic government, which foreign observers have witnessed with astonishment.<sup>36</sup> The chairman in vain raps for order; the crowd becomes quiet only after its pent-up energy has been discharged. Finally the storm spends its force, and the chairman recognizes some delegate—now usually a woman—to second the nomination. The tone of her address is similar to that of the speeches which have preceded, and it is rewarded by outbursts of applause, which amount, in some cases, to small demonstrations. Following this, other delegates may secure recognition and endorse the candidate by seconding his nomination. This general process is followed with respect to all the nominees, the noise and enthusiasm offered as a tribute to each depending on his popularity—and on how well his floor managers have done their work.<sup>37</sup>

With the roll-call of states completed and all nominations made and seconded, the convention is ready for the balloting. The two major parties follow distinct practices in this matter. The Republicans allow one vote to each delegate and he may cast it as he pleases regardless of the views of the other members of the delegation from his state. Further, nominations are made on the basis of a simple majority of votes. The Democrats, on the other hand, follow the so-called two-thirds and unit rules. The first of these simply provides that the candidate receiving the nomination must obtain at least two-thirds of all the votes of the convention. Adopted first in 1832, this rule later came to be favored by the slave states as a means of checkmating opposition to their institution. It has been preserved largely as a matter of tradition and because the unit rule permits a two-thirds majority to be built up almost as easily as a simple majority in the Republican convention. This latter rule is to the effect that the majority of delegates from a state may determine how the entire vote of the state shall be cast. It applies only when the state convention has so instructed its delegates, except in regard to those states having their delegates elected in the primaries and not subjecting them to the authority of the state committee or convention. The number of ballots necessary to secure the required vote in either convention will naturally depend on personal and factional groupings. If the majority are united behind a single candidate, the nomination

<sup>36</sup> Bryce, *American Commonwealth*, II, 194; Ostrogorski, *op. cit.*, II, 268-69.

<sup>37</sup> Cf. *New York Times*, June 15 and June 28 for accounts of Republican and Democratic convention demonstrations for 1928.

may come without delay. It frequently happens that this result is accomplished on the first ballot. But if the forces are evenly balanced, prolonged balloting may be necessary to break the deadlock. Under such circumstances, opportunity is offered to "dark-horses", individuals not formerly in the running, to secure the nomination as the result of compromise. Hurried meetings are held in hotel rooms or lobbies, and a candidate acceptable to the various groups is decided upon. Thus in the Republican convention of 1920, the Johnson, Lowden, and Wood factions united on Warren G. Harding in an effort to conciliate their points of view. The serious deadlock between the McAdoo and Smith elements in the Democratic convention of 1924 was finally broken on the hundred-and-third ballot by the nomination of John W. Davis.

The question of an aspirant's "availability" is an important one, and receives the closest attention of the party leaders. For one thing, the candidate must suit the temper of the time. There is a "law of the pendulum" in politics, a law of ebb and flow,<sup>38</sup> which dictates that after a period of vigorous leadership the people will be most likely to accept a quieter, more commonplace individual, and *vice versa*. The candidate should be selected with this in mind. Another matter of importance is the candidate's personal qualities. He must be magnetic, a ready speaker, "a good mixer", regular in his party affiliations, not so pronounced in his views as to be unacceptable to any large group of his party or of the population at large. Emphasis upon these characteristics of an agreeable candidate, in distinction to an able statesman, has sometimes led to the election of mediocre and colorless men,<sup>39</sup> but it has also kept erratic and uncompromising persons out of the office of President, an important service. Again, the candidate must be selected from a doubtful section of the country. It has been shown that the presidential candidate carries his state three times out of four; he is therefore chosen with this possibility in view. This accounts for the fact that New York and Ohio are so often honored as the home of candidates. They are doubtful large states, the one having forty-five and the other twenty-four electoral votes. The Solid South has no chance of securing the nomination for one of its favorite sons, for the very plain reason that the South always votes Democratic. Neither party has anything to gain by humoring it with a presidential nomination.

After the convention has named its candidate for the presi-

<sup>38</sup> W. B. Munro, *The Invisible Government* (1928), Ch. III.

<sup>39</sup> Cf. Bryce, *op. cit.*, I, Ch. VIII.



dency, it proceeds, usually in a perfunctory manner, to nominate its vice-presidential candidate. Usually only one ballot is necessary to accomplish this task. The office is regarded as one of minor importance, which bars its occupant from future political preference. Only in case of the death of the President, which has taken place on six occasions, does the Vice-President succeed to the authority and responsibility of the chief executive office. He, therefore, is named primarily on the basis of his availability as a running-mate for the presidential nominee. The ticket is balanced to reconcile all elements in the party. If one of the candidates is a conservative, the other should be a liberal; if one is from the East, the other should be from the West or the Central states; if one is "wet", the other should be "dry." The chief considerations determining the choice of the vice-presidential nominee are the carrying of another pivotal state, of consoling the faction in the party which failed to name the presidential candidate, and the securing of large campaign funds through the influence of the person selected or his friends. The procedure followed is the same as in the choice of the nominee for the Presidency. Ostrogorski describes the steps thus: "roll-call, introduction of the aspirants in high-faluting speeches in which they appear surrounded with a halo of virtue and glory; several consecutive ballots, and the shouts of the crowd; but these latter already betray a certain weakness and lassitude, the arms move mechanically, all the voices are hoarse."<sup>40</sup> Tired of the suspense and excitement, and often empty of purse, the delegates rush through this formality and hurry to their trains, for the demands of their normal activities have already begun to press hard upon them. As a sort of after-thought the convention meanwhile has selected the new national committee and authorized the chairman to appoint two committees, composed of one member from each state, formally to notify the candidates of their nomination.

(5) *Criticisms of the Convention.* The national nominating convention has been subjected to a great deal of criticism, most of which is well founded. One newspaper correspondent, who has carefully observed it at work, has declared:

A national convention represents more wasted energy, more futile bootless endeavor, more useless expenditure of noise, money, and talent, than any other institution on earth. It has grown into a cumbersome, frightfully expensive, terribly laborious machine which

<sup>40</sup> *Op. cit.*, II, 278.

spends months getting under way, and once under way devotes nine-tenths of its time of operation to buncombe and claptrap which deceive no one, not even the men who create this buncombe and claptrap. At last, when the shouters have grown weary and the lesser booms, being punctured, have lost the only thing they ever contained—which is wind—the real leaders go ahead and do the thing they might have done earlier, except for the belief among them that the fetish of tradition must be coddled, and the convention, obeying an ancient precedent, must be permitted to drag out a foregone conclusion, which twice out of three times was a foregone conclusion from the start.<sup>41</sup>

Professor Ray has summarized the shortcomings of the body, as follows: (1) Since it meets only once in four years, it is an unsatisfactory agency for the formulation of national party policies. (2) The size of the convention prevents real deliberation and debate. (3) The basis of representation is inequitable, especially with regard to the Republicans. (4) Too often the delegates are controlled by local politicians. (5) The presence of federal office-holders, appointed by the administration, gives it an undue influence in determining nominations. (6) The national committee, in making up the temporary roll of the convention, has too much power, for the delegates seated temporarily are the ones who determine the personnel of committees and the acceptance or rejection of their reports. (7) The convention is irresponsible, and the rules which govern it often ignore the rights of the party membership at large. (8) The mass of party voters have practically no direct influence in determining the nominees of their party. He does not advocate abandoning the convention, but says that it must be regulated by national law, that it must be made to supply the open, responsible, and official leadership in the selection of candidates which is needed. This can be done, he declares, by holding a direct primary *subsequent* to the convention, in which the voters would choose from *several* names submitted to them by the convention their party leader. The convention would thus do no more than draft the party platform and choose five or six persons from whom the party voters all over the nation would make their choice.<sup>42</sup> In spite of some disadvantages of such a plan, it has much merit. Certainly it would be worth trying in preference to the present impossible scheme, which makes free government, so far as our most important nominations are concerned, largely a matter of accident, of wire-pulling, of political scheming, accomplished

<sup>41</sup> Irvin S. Cobb in *Chicago American*, June 10, 1916.

<sup>42</sup> *Op. cit.*, 153-164.

amid confusion, which prevents rational action on the part of the delegates and plays directly into the hands of self-seeking politicians, who spurn the interest of the party as a whole.

### III. THE REGULATION OF PARTY ACTIVITIES

The national campaign follows in the wake of the convention meetings. The national committee of each party meets in due time and formally names its chairman, who is actually appointed by the presidential nominee. Other officials for the conduct of the campaign are chosen—the secretary, the treasurer, sub-committees, division heads. As has been noted, the national chairman is the real director of the campaign, resorting to the strategy which he thinks will win success for his candidate. Campaign headquarters are established in the principal cities—New York, Chicago, Washington, and elsewhere. A spirited campaign is carried on by the treasurer and his forces to raise money sufficient to finance the stupendous undertaking of carrying the election. Literature—campaign text-books, pamphlets, extracts from the press, lithographic portraits of the candidates, circular letters, and many other items—must be printed in staggering quantities and distributed throughout the country. Speakers must be employed; political rallies must be held; halls must be hired; radio broadcasting must be arranged and paid for; newspaper advertising must be purchased in abundant amount. All this requires money, which the party must raise by voluntary subscriptions from those interested in the party success. Numerous devices may be employed in the effort to secure the endorsement of the public. The candidates may “stump” the country or may conduct their campaigns from the “front-porch.” The election of 1896 witnessed the employment of these two methods, Bryan conducting an active “whirlwind” campaign of 18,000 miles distance, McKinley remaining at home and receiving delegations who came to pay their respects and to hear their leader discuss the issues before the country. The campaign of 1928 was marked by the candidates visiting the chief cities in the disputed states, and by the wide use of radio connections, bringing millions within the sound of the speakers’ voices. The doubtful states are usually canvassed thoroughly, money being expended extravagantly in the effort to secure every possible vote. As the election approaches, the party leaders redouble their efforts. Charges and counter-charges are commonly made. Appeals for support, predictions of

certain victory, warnings to lagging party members, fill the daily press and rend the air. All this may prove to be stimulating entertainment and it may have an ultimate educational effect, but there is much to be said on the other side. Too often the result is to confuse and mislead the voter. In the uncertain states, where the contest is the hottest, there is much temptation to resort to unfair and illegal means of obtaining votes. There is reason to believe that presidential campaigns have a temporary ill-effect upon business. Whatever their shortcomings may be, however, they are necessary if democracy of the American type is to function. The question, after all, is not one of abolishing them, but of properly regulating them to prevent their abuse.

The chief problem arises in connection with the financing of campaigns. The danger of the money power in politics, particularly in campaigns, is well recognized.<sup>43</sup> The methods by which public opinion is generated—to a great extent through propaganda—enable “big business” to exert an unusual influence upon the government and governmental policies because of its ability and readiness to contribute huge sums to the party which will protect its interests. The rapidly mounting campaign funds in recent years, coupled with scandals which have arisen in connection with their collection, have caused the federal government to intervene.<sup>44</sup> In 1910 Congress passed a corrupt practices act designed to secure publicity for campaign contributions and expenditures. It provided that a political committee, if it sought to influence an election in two or more states in which congressional representatives were chosen, must file a sworn statement through its treasurer with the clerk of the House of Representatives within thirty days after the election, showing the total of all receipts, the names and addresses of all persons contributing one hundred dollars or more, the total of all disbursements, the names and addresses of all persons to whom more than ten dollars has been paid, and the purpose of such payment.<sup>45</sup> The act was amended and made more comprehensive in 1911, so that the treasurer was now obliged to file a statement within thirty days after the election, as previously, and

<sup>43</sup> Bryce, *Modern Democracies*, II, Ch. LXIX. For a defence of the money power, see Munro, *op. cit.*, Ch. V.

<sup>44</sup> The Democratic National Committee commanded less than \$25,000 in 1856 but \$1,567,931 in 1924; the Republican National Committee commanded \$100,000 in 1860 and \$6,627,784 in 1924. Cf. Brooks, *op. cit.*, 329, and Sait, *op. cit.*, 502-3. Also see Frank R. Kent, *The Great Game of Politics* (1926), 112-141, 238-243.

<sup>45</sup> U. S. Statutes, Vol. XXXVI, Part I, 822-24.



also ten to fifteen days before the election. Congressional candidates are also required to file such statements before and after the election, as well as within fifteen days before and fifteen days after any primary or convention at which such candidates may be nominated or endorsed. Maximum expenditures by candidates were also imposed.<sup>46</sup> In 1925 another corrupt practices act was applied, extending the application of the national law to branches or subsidiaries of the national organization, and requiring the treasurer of the national committee to file statements with the clerk of the House in March, June, and September, and twice before any general election, and on the first of January. Candidates for the Senate and House must also file statements before and after the election. The maximum expenditures allowed shall not exceed that fixed by the state law or in any case \$10,000 for senatorial candidates and \$2,500 for candidates to the lower House. Such candidates, however, have the option of expending an amount equal to three cents per voter in the last general election, provided this amount does not exceed \$25,000 for the Senate and \$5,000 for the House.<sup>47</sup> It is well to bear in mind that these provisions apply only to the general elections and not to primaries of the parties, the Supreme Court having held that Congress has no authority to regulate primaries within the states.<sup>48</sup> Other federal acts regulate the raising of funds for party purposes. Thus the Civil Service Act of 1883 forbids federal employees to solicit from or pay to another such employee any political contribution, and no one may seek such a contribution from a federal employee. The Act of 1907 makes it unlawful for corporations doing business in two or more states to contribute funds for any election purposes, and for any corporation whatever to contribute money for an election with which national officials are concerned.<sup>49</sup>

The government is justified in taking these steps to insure, as far as possible, that parties shall be free of unfair practices in conducting elections. This is true because of the intimate connection between political parties and the government. As has already been pointed out, parties control the entire governmental process. They function continually through the President and through Congress. Thus they appear in the caucuses of the Senate and House, actually dominating the legislative policies of the government. If

<sup>46</sup> *Ibid.*, Vol. XXXVII, Part I, 25-29.

<sup>47</sup> *Code of the Laws of the United States* (1926), 15-16.

<sup>48</sup> *Newberry vs. United States* (1921), 256 U. S. 232. For discussion of this case, see Sait, *op. cit.*, 527-530.

<sup>49</sup> See J. K. Pollock, Jr., *Party Campaign Funds* (1926), *passim*.

the President is of the same party as the majority in each house, he may become an effective director of the work of these two bodies, a sort of Prime Minister, such as Woodrow Wilson conceived and proved himself to be during his first administration, carrying through an entire program of reform. Party thus makes for cohesion of forces and harmony of efforts. But if the executive and the legislative branches are dominated by members of different parties, deadlock and friction may result, as when after 1918 Wilson confronted an antagonistic Senate and House. Such is an inevitable result of our system of checks and balances. Fortunately, sharp party divisions are infrequent in Congress, the greater amount of its work being administrative rather than legislative in character.<sup>50</sup> It may be concluded that national parties have come to perform an indispensable part in our government, supplying, in spite of their defects, instrumentalities which respond effectively to the requirements of a numerous electorate, and filling the gaps found in our elaborate and rigid constitutional system by converting a machine designed primarily to prevent tyranny into a machine competent to serve in a positive manner the needs of modern civilization.

<sup>50</sup> Cf. Robert Luce, *Congress, An Explanation* (1926), Lectures III and IV. Luce says "that probably nine tenths of the work of Congress relates to the spending of money, the regulation of the processes and practices incident thereto, and the assessing of the cost." *Ibid.*, 64.

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## CHAPTER XI

### THE PRESIDENCY

#### I. THE BACKGROUND OF THE PRESIDENCY

"Governments are what politicians make them" said Woodrow Wilson, "and it is easier to write of the President than of the presidency."<sup>1</sup> The type of executive that a system of government shall have is always a serious problem in its construction. It is not exclusively a matter of theory, experience, or psychology, but involves as well the character of the government to be established. Is it to be of the cabinet or presidential form? Where are leadership and responsibility to be located? Are the powers of the executive to be nominal, their actual exercise being left to other agents? Is it to be responsible or irresponsible? If responsible, to whom? To the legislative body or the people? Is it to be hereditary or elective? If elective, by whom and for what term?

The American forefathers because of their experience with the English Crown and their knowledge of other political systems were not certain that they wanted an executive at all. They had fought the Revolutionary War, made a treaty of peace, and lived under the Articles of Confederation for eight years without an executive. Had not executives been mainly responsible for the wrecking of previous systems of government? Was not an executive an anomaly in a republican form of government anyway? Was it not impossible to provide an efficient executive without at the same time laying the foundation for a monarchy? If its powers were granted to a single individual, would not the specter of Cæsar, Napoleon, or George III be discernible in the background? It was generally understood that the very semblance of a monarchy would be quickly detected and would endanger the adoption of any proposal for the new order. To resort to a plural executive would, of course, avoid the appearance of a monarchy but would it not give rise to confusion, jealousy, intrigue, and violence that would

<sup>1</sup> *The President of the United States* (1916), 2.

ultimately vitiate the entire system of government and create dissension among the people? Had not this been the experience of the Romans with the consulate?

From the point of view of theory there seemed to be a rather strong case against providing for a powerful unitary executive. On the other hand, the experience of the Americans with the colonial governors had not been entirely unsatisfactory. Moreover, did not many of the weaknesses of the Confederacy (1781-1789) result from its lack of an executive to furnish leadership, vigor, and dispatch in its administration? Did not Washington through personal influence win the Revolutionary War and independence and give birth to a new nation despite the weakness and even interference of Congress? Had not the best statesmanship of the nation withdrawn from Congress and left it a set of mediocre men who were unable to discover their own minds? Furthermore, if a single executive were established, would not Washington be selected for the place? Who could entertain fear of a man who had refused to be made King of the nation?

By the time of the meeting of the Convention in 1787 it was generally considered among the leaders of the movement for a stronger government that an executive magistracy of some kind should constitute a part of the revised system though at this time its form and powers were still matters of speculation. Madison, immediately preceding the meeting of the Convention, said: "A national executive will be necessary. I have scarcely ventured to form my own opinion yet, either of the manner in which it ought to be constituted, or of the authorities with which it ought to be clothed."<sup>2</sup> All of the proposals for the reconstruction of the government made in the Convention contained provisions for an executive.

## II. ITS ESTABLISHMENT

The four proposals for the new Constitution made in the Convention of 1787 differed as to their recommendations concerning an executive. The Virginia or big state plan proposed the establishment of an executive elected by Congress.<sup>3</sup> It dodged the question of whether it should be unitary or plural in character by using language equally applicable to either, though Randolph who introduced it into the Convention later explained that a plural executive

<sup>2</sup> Quoted by Grover Cleveland, *The Independence of the Executive* (1913), 16.

<sup>3</sup> Hunt and Scott, *Debates in the Federal Convention of 1787*, 24-25.



was intended and that he regarded unity in the executive magistracy as "the foetus of monarchy."<sup>4</sup> The fact that the Virginia proposal was not explicit on this matter would apparently indicate not only uncertainty on the part of the Virginia delegation on this point but also the caution with which the subject was approached. The New Jersey or little state proposal recommended the establishment of a plural executive elected by Congress and presumably representative of the different sections of the country.<sup>5</sup> Pinckney's proposal, which was not considered by the Convention but was used by the Committee of Detail, provided for a President elected by Congress.<sup>6</sup> Hamilton suggested the creation of a single executive to be called a Governor and to be elected indirectly not by Congress but by electors, chosen either by the voters or by other electors chosen by the voters. His idea was to place the executive as far away from the people as possible.<sup>7</sup>

The Committee of the Whole decided on June 1st in favor of establishing a National Executive but was unwilling at this time to go on record in favor of unity in the executive. Rutledge of South Carolina remarked that he observed a "shyness" on the part of the Convention to discuss this matter but that he favored vesting the executive authority in a single person as a means of fixing responsibility for the administration. James Wilson of Pennsylvania "preferred a single magistrate, as giving most energy, dispatch, and responsibility to the office." Randolph of Virginia strenuously opposed unity in the executive magistracy, contending that the requisites of vigor, dispatch, and responsibility "could be found in three men as well as in one man." Wilson maintained "that unity in the executive instead of being the foetus of monarchy", as Randolph insisted, "would be the best safeguard against tyranny."<sup>8</sup> Randolph replied that he believed that he would always feel opposition for a single executive and summarized his arguments against it as follows: (1) "that the permanent temper of the people was adverse to the very semblance of monarchy; (2) that a unity was unnecessary, a plurality being equally competent to all the objects of the department; (3) that the necessary confidence would never be reposed in a single magistrate; (4) that the appointments would generally be in favor of some inhabitant near the center of the community, and consequently the remote parts

<sup>4</sup> *Ibid.*, 38.

<sup>5</sup> *Ibid.*, 103.

<sup>6</sup> *Ibid.*, 597.

<sup>7</sup> *Ibid.*, 119.

<sup>8</sup> *Ibid.*, 38.

would not be on an equal footing.”<sup>9</sup> Wilson doubted “that the alleged antipathy of the people” to a single executive really existed, pointing out that one of the few features of uniformity in the state organizations was a single magistrate at the head of their governments. Moreover, “among three equal members, he foresaw nothing but uncontrolled, continued, and violent animosities; which would not only interrupt the public administration; but diffuse their poison through other branches of the government, through the states, and at length through the people. If the members were to be unequal in power the principle of the opposition to the unity was given up. If equal, the making them an odd number would not be a remedy.”<sup>10</sup> On June 4th, the Committee of the Whole decided in favor of a single executive by a vote of seven states to three. This was the first step in the creation of the Presidency.

On July 26th, a resolution to this effect was referred to the Committee of Detail, which in its report on August 6th, gave to the executive the style of “The President of the United States of America” and the title of “His Excellency.”<sup>11</sup> The term President had been used in the Franklin Proposal of 1754 as the style for an American executive, and the executives of some of the states were still called Presidents. It was not, therefore, a radical departure to agree to the recommendation of the committee in this respect, but the title of “His Excellency” smacked of royalty and was eliminated.

The adoption of the resolution in favor of vesting the executive authority in a single executive to be styled President was regarded as an abandonment of the principle of legislative supremacy and the acceptance of the doctrine of coordinate departments.<sup>12</sup> This marked a departure from the English system in which parliamentary supremacy prevailed with executive subordination. It meant that the new Congress would differ from that of the Confederation which exercised a pretense of both legislative and executive authority. It meant an executive independent of legislative control and responsible to the people.<sup>13</sup>

This was James Wilson’s conception of the Presidency for which he frequently contended during the Convention. From this theory

<sup>9</sup> *Ibid.*, 49.

<sup>10</sup> *Ibid.*, 49-50.

<sup>11</sup> *Ibid.*, 343.

<sup>12</sup> See Charles C. Thatch, Jr., “The Creation of the Presidency (1775-1789),” 40 *Johns Hopkins University Studies in Historical and Political Science*, 428-591.

<sup>13</sup> Cleveland, *op. cit.*, 1-17.

of an independent and responsible executive a number of steps logically followed. It called for an independent method of election instead of election by Congress. It meant that a council associated with the President whose advice he would have to follow was an illogical arrangement.<sup>14</sup> Wilson contended that the association of a council with the President would destroy the responsibility of the office, stating that it "oftener serves to cover than prevent malpractices."<sup>15</sup> It also followed that if the President was given the power to veto he should exercise it himself rather than in connection with a Council of Revision. It was for this reason that a constitutional council was not provided. In defending this action of the Convention, it was pointed out by Hamilton that "in a republic, whose every magistrate ought to be personally responsible for his behavior in office, the reason which in the British constitution dictates the propriety of a council, not only ceases to apply, but turns against the institution. As the monarchy of Great Britain, it furnishes a substitute for the responsibility of the chief magistrate, which serves in some degree as a hostage to the national justice for his good behavior. In the American republic, it would serve to destroy, or would greatly diminish, the intended and necessary responsibility of the Chief Magistrate himself."<sup>16</sup> Of course, a cabinet was likewise excluded by the theory of individual responsibility of the executive. Wilson maintained that unless the executive was made independent in the exercise of its powers, not only would it be irresponsible as in Great Britain, but it would be unable to defend itself against Congress which would ultimately exercise its powers in fact. The principle of checks and balances required a strong executive to act as a limitation on the powers of Congress. It was in line with this conception of the Presidency that Wilson proposed the election of the President by the people, and it is interesting to note that the method of election adopted has come to be regarded as practically synonymous with popular election. Its adaptation to the party process has added vigor to the Presidency.

A strong influence in aiding Wilson to persuade the Convention to agree to his theory of the executive magistracy was the belief that George Washington should be its first occupant. "Entre nous, I do [not] believe they [the executive powers] would have been as great," wrote Pierce Butler to England, "had not many of the members cast their eyes toward General Washington as President ;

<sup>14</sup> Benjamin Harrison, *This Country of Ours* (1897), 69-71.

<sup>15</sup> Hunt and Scott, *op. cit.*, 50.

<sup>16</sup> *The Federalist* (Lodge Ed.), 443.

and shaped their Ideas of the Powers to be given a President by their opinions of his virtue."<sup>17</sup>

### III. THE CHANGING CHARACTER OF THE PRESIDENCY

"The Presidency," said Woodrow Wilson, "has been one thing at one time, another at another, varying with the man who occupied the office and with the circumstances that surrounded him."<sup>18</sup> According to this eminent authority, the Presidency has varied in its influence, speaking roughly, about as follows: (1) 1789-1825. A period of constitutional foundations during which the nation was acquiring dignity and respect at home and abroad and Presidents well trained for leadership followed English precedents and traditions; (2) 1825-1836. A period of personal rule by Andrew Jackson who was not troubled by precedent, tradition, or the Constitution, was not frightened by a babbling Congress, or controlled by judicial decisions; (3) 1836-1861. A period of domestic turmoil with Congress leading and mediocre Presidents following; (4) 1861-1865. The Tudor period of the Presidency with the President dictating and Congress voting supplies and enacting such legislation as he requested; (5) 1865-1898. A period of Congressional supremacy during which Congress practically usurped the executive function and forced timid Presidents to become their obedient servants with the notable exceptions of Andrew Johnson and Grover Cleveland whose leadership, however, amounted only to a negative to the will of a Congress drunk with power; (6) 1898 to the present. A period of world politics in which the President has been the chief figure and at times, particularly in the cases of Roosevelt and Wilson, has been the leader of his party and the formulator of our domestic policies. If the details of these periods were supplied, some slight variation one way or the other would doubtless be discovered, but in the main the facts sustain the thesis that the Presidency as a governmental agency counts for much or little depending upon the quality of the leadership of those who exercise its powers. It is worthy of remark, however, that the President as its chief agent has at no time been reduced to the harmless and irresponsible figurehead which the English King has become as an agent of the Crown.<sup>19</sup> The Presidency has constantly

<sup>17</sup> Max Farrand, *Records of the Federal Convention*, III, 301.

<sup>18</sup> *Op. cit.*, 10.

<sup>19</sup> Woodrow Wilson, *Constitutional Government in the United States*, 57-59.



adapted itself to the changing temper and purposes of our people despite the constitutional mechanics of our system of government.<sup>20</sup>

#### IV. THE POPULARIZATION OF THE PRESIDENCY

From an institution that smacked of monarchy and was one of the chief objects of criticism by the opponents of the Constitution, the Presidency has become the champion of the welfare of the nation and the most admired feature of the work of the Convention of 1787. "In the scheme of our national government the Presidency," said Cleveland, "is preëminently the people's office."<sup>21</sup> It is directly related to the people as citizens in the enforcement of the Constitution and laws of the nation—"none so lowly as to be beneath its scrupulous care, and none so great and powerful as to be beyond its restraining force."

This evolution in the character of the Presidency is comparable in many respects to the modification that has been made in the English Crown by the democratization of English political institutions. Its agents have become, like those of the Crown, the means of giving unity and direction to the entire system of government and have converted it into what students of political science call the presidential form of government. A very great difference in these two developments is that the President has not only remained the effective legal agent of the Presidency but has also become its chief political agent, whereas in the English system the King has become a legal fiction, the Privy Council exercising the legal powers of the Crown, and the cabinet has become its political agent responsible not to the King but to the House of Commons.

In this larger and extra-legal sense, the Presidency may be said to include (1) the President as chief executive, (2) the President as the head of national administration, (3) the executive secretaries and their subordinates as his agents, (4) the Cabinet as his political advisors, and (5) the leaders of his party and his co-workers in formulating and enacting his policies into law. In all of these relations the prestige and influence of the Presidency is constantly felt and is frequently controlling. "The Administration of government," said Hamilton, "in its largest sense, comprehends all the operations of the body politic, whether legislative, executive, or judiciary."<sup>22</sup>

<sup>20</sup> Edward Stanwood, *A History of the Presidency* (1912), I, 1-4.

<sup>21</sup> *Op. cit.*, 9.

<sup>22</sup> *The Federalist* (Lodge Ed.), 450.

While many forces and conditions have been responsible for this evolution of the Presidency, it may be chiefly attributed to (1) the conversion of the constitutional method of electing the President into practically popular election, thus giving him a direct touch with the people and a fresh mandate from them for his policies; (2) the personality of such Presidents as Lincoln, Cleveland, Roosevelt, and Wilson; (3) the development of the United States as a world power in which capacity the President is its chief "spokesman;" (4) the changing character of our society, calling for executive leadership and expert administration instead of legislative direction; (5) the rise and development of the party system, converting the President into a partisan leader and furnishing him with a party as a means of enforcing his will; and (6) the growth in the functions of the government and the consequent expansion in its administrative force under almost the absolute control of the President, thus enabling him to extend his influence over both persons and things throughout the nation.

The Presidency in this newer and more comprehensive sense is an institution superimposed by the unwritten constitution as the means of overcoming the mechanics of our governmental system. Our forefathers thought of government as an association of friendly antagonisms—a piece of mechanics with its parts so separated as to prevent any coercive agency from controlling its operation. This arrangement was to them a guarantee against the development of either monarchy or democracy, of both of which they were mortally afraid. A mechanical contrivance might work according to this theory but a machine of men will not. "Government," it has been truly said, "is not a body of blind forces; it is a body of men, with highly differentiated functions, no doubt, in our modern day of specialization, but with a common task and purpose. Their coöperation is indispensable, their warfare fatal."<sup>23</sup> It is by means of the ramifying influences of the Presidency that the various departments of the government of the United States are brought into union and made to function in obedience to the public opinion of the nation. It is in the successful performance of this task that the Presidency can claim to be the most powerful magistracy of the world and the chief agency of the American democracy.

<sup>23</sup> Woodrow Wilson, *The President of the United States*, 10.

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## CHAPTER XII

### THE PRESIDENT

#### QUALIFICATIONS, TERM OF OFFICE, COMPENSATION, AND ELECTION

1. *Qualifications.* The first proposal in the Convention on the qualifications of the President was that "he shall be of the age of thirty-five years, and a citizen of the United States, and shall have been an inhabitant thereof for twenty-one years."<sup>1</sup> This suggestion was not debated at the time and on August 31 was referred for consideration to a committee of eleven, one from each state represented, which on September 4th reported the following recommendation: "No person except a natural born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President: nor shall any person be elected to that office who shall be under the age of thirty-five years, *and who has not been, in the whole, at least fourteen years a resident within the United States.*"<sup>2</sup> On September 7 these qualifications were unanimously adopted by the Convention without debate, but the Committee of Style changed the phraseology of the provision to the present constitutional form: "No person except a natural-born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years and been fourteen years a resident within the United States."<sup>3</sup>

It is noticed that the Committee of Eleven radically changed the original proposal by requiring that the President be a native-born citizen, or a citizen at the time of the adoption of the Constitution, otherwise a foreigner on becoming a citizen would have been eligible to the office of President. Even with the above qualifi-

<sup>1</sup> Hunt and Scott, *Debates in the Federal Convention of 1787*, 448.

<sup>2</sup> *Ibid.*, 507.

<sup>3</sup> *The Constitution*, Art. II, Sec. 1.

cations it would still have been possible for a person who had just become a citizen of one of the states or for a native-born citizen who had lived most of his life in a foreign country to have become President. It was necessary, therefore, in order to eliminate these possibilities, to require as a part of the qualifications a period of residence in the United States. While now only a native born citizen can become President, it would have been possible for a foreigner who was "a citizen of the United States at the time of the adoption of the Constitution" and who had been a resident of the United States for fourteen years prior to his election to have become President.<sup>4</sup> The requirement of fourteen years of residence in the United States means any fourteen years preceding election.<sup>5</sup>

2. *Term of Office.* The term of office of the President was a very difficult matter for the Convention to settle. Ten different suggestions as to length of term were made, varying all the way from three years to during good behavior.<sup>6</sup> A six-year term was at one time adopted. It was twice decided after duly considering the matter that the President should hold office for a seven-year term and be ineligible for reelection. There was considerable support for a life term,<sup>7</sup> but it was finally, September 6, thought best to have a short term of four years with no constitutional provision whatever relating to reëligibility.

It would possibly have been a better arrangement if the seven-year term with ineligibility had been retained. It would have made him independent of party traffic and thus have saved him considerable time for more important matters.<sup>8</sup> Four years is a short term for such an important officer, especially in view of the fact that the term of a Senator is six years, and that he is usually repeatedly reëlected. Experience has shown that the President begins to campaign for reelection as soon as he is inaugurated, and that his management of the government for the first four years is usually of a compromising character with reelection in mind. By the time he has reached his second administration, his party has frequently lost control of one of the houses of Congress, thus creating a serious barrier to the effectiveness of his leadership.

<sup>4</sup>This provision of the Constitution made Alexander Hamilton and James Wilson, both foreigners, eligible to the office of the President.

<sup>5</sup>Charles K. Burdick, *The Law of the American Constitution*, 54.

<sup>6</sup>These were 3, 4, 5, 6, 7, 8, 11, 15, 20, and life. See Hunt and Scott, *op. cit.*, 40, 41, 270, 271, 273, 288, 314, 507, 521.

<sup>7</sup>New Jersey, Pennsylvania, Delaware, and Virginia favored a life term for the President.

<sup>8</sup>Benjamin Harrison, *This Country of Ours*, 71-73.



It has been generally true that the longer a President remains in office the less support he receives from his party; especially is this true if he is an able man. Cleveland, Roosevelt, and Wilson are examples. A dominating personality at one end of Pennsylvania Avenue sooner or later creates organized opposition at the other end. In view of this fact, it would, in all probability, be a serious mistake for the third term tradition to be broken. While the party system normally seems to call for its observance, it is not difficult to see that at times its overthrow might serve the interests of a particular situation. This worthy convention left us by our illustrious forefathers must in the future depend for its validity upon the sacredness with which political parties will regard it.

3. *Compensation.* The salary of the President was originally fixed at \$25,000 a year; in 1871 it was increased to \$50,000, and in 1909 to \$75,000. In addition to his personal salary, he is furnished an Executive Mansion, executive offices, traveling expenses, secretaries, clerks, contingent fund, automobiles, etc., totaling more than \$300,000. The office, however, is not as expensive as that of the English King or the German or French President. The salary of the Vice-President is \$12,000 a year.

4. *The Election of the President.* After the candidates for the office of President and Vice-President have been nominated in national party conventions as previously explained, and have been formally notified of this fact by committees appointed for this purpose by the national conventions,<sup>9</sup> the newly appointed national committees plan, in consultation with the candidates of their respective parties, the campaign to be waged for their election. This task is no less than that of planning and executing the greatest political pageant known in the field of practical politics. The spectacle of thirty-five or forty millions of voters going about the task of electing a President to preside over their destiny for four years is a political phenomenon of such tremendous proportions and significance as to challenge and grip the most stubborn imagination. The burden of this great campaign falls mainly on the shoulders of the chairman of the national committee of each of the great parties. He needs to be a man who is experienced in handling big propositions because he must organize and direct a huge army of speakers, spend most effectively large sums of money, see that train loads of vote-getting literature are published and distributed,

<sup>9</sup> At the time of these formal notifications, the candidates deliver their acceptance speeches in which they elaborate the platforms of their parties and state their own views on the issues of the campaign.

critically observe every movement of the opposition party, discover the sections, states, or districts where the contest is the closest, and concentrate in the closing days of the campaign on these doubtful groups of voters with able speakers and frequently with large sums of money. The successful performance of this task calls for an executive ability of the highest order and a generalship matched only by the accomplishments of the greatest strategists of military history. After all, it is a game in which the ballot has been substituted for the sword.

Second in importance in this performance only to the chairman of the national committee is its treasurer whose task is to raise the money necessary to finance the campaign planned by the chairman and the committee. He needs to be a man who is a genius at raising large sums of money and who has the confidence of the financial interests of the nation. In some campaigns his task is easier than in others for the reason that the issues involved more seriously affect the commercial, industrial, and financial interests of the country. The issue of free trade in 1888 and free silver in 1896 made the matter of financing the Republican campaigns for these years comparatively easy.<sup>10</sup>

The location of the party headquarters as a base of operation is an important matter. They should be and usually are near the doubtful territory, where, of course, the fight is fiercest and the big artillery is used. As a rule Chicago and New York are both used as distributing centers of the campaign literature and locations for speakers' bureaus.

The literature to be used to challenge the attention of the voters is one of the more important problems of the national committee. There are two publications of special importance: (1) the campaign text-book issued by each party, containing the platform, notification and acceptance speeches, biographical sketches of candidates, economic statistics, and a general defense of the position of the party, and (2) a text-book issued by the Congressional Committee, dealing with party history and policy. These publications are usually distributed among speakers and newspaper men with a view to furnishing partisan material for speeches and newspaper editorials designed to influence the voters.

A tremendous amount of pamphlets, leaflets, posters, cartoons, and speeches, printed in every language spoken by a fairly large group of voters, must be produced and widely distributed. Thousands of articles must be written for magazines and newspapers

<sup>10</sup> See James K. Pollock, Jr., *Party Campaign Funds* (1926), 62-110.

with a view to reaching all classes of readers. A large corps of writers and a bureau of printing under expert direction are necessary to meet this demand.

A bureau of all grades of speakers to suit all crowds and communities is established and expertly directed with a view to furnishing the color and touch not found in the literature of the campaign. Dramatics must be used with psychological astuteness if the best results are obtained. Itineraries for these speakers must be planned, auditoriums engaged, bands employed, and parades organized and directed. Things must be done with a bang and a slam.<sup>11</sup>

The presidential candidates generally participate in the campaign in some way, either by the gum shoe or by the megaphone method. The former was used by McKinley in the campaign in 1896 when he remained at his home in Canton, Ohio, and addressed crowds of visitors, who apparently came from all over the country on their own initiative to hear him speak. What actually happened was that these groups had been organized by political leaders and provided with their expenses, a band, and all the paraphernalia which the dramatics of the occasion required. The leader of the group had previously prepared an address on the issues of the day and the services of the "Grand Old Party" to the nation, and had in some instances already visited McKinley, delivered his speech, and received the criticism of McKinley who, by the time this matchless and enthusiastic leader had returned with his group, had prepared a response to it. What to the public seemed to be a thing of spontaneity was instead a piece of dovetailed rhetoric of the highest order. The effect of the whole procedure delighted the heart of the politician and made thousands of McKinley supporters of people who were particularly impressed with the knowledge and literary qualities of the Republican candidate.<sup>12</sup> McKinley had a large corps of statisticians, psychologists, writers, newspaper men, and stage setters to assist him in playing his part. The whole performance rang with the harmony of grand symphony.

The megaphone method employed by Bryan in this same campaign was more spectacular but not nearly so effective in some respects.<sup>13</sup> He made hundreds of speeches under the spell of matchless oratory, but they lacked the thought and coherence which time

<sup>11</sup> See Joseph Bucklin Bishop, *Presidential Nominations and Elections* (1916), 151-164.

<sup>12</sup> P. Orman Ray, *An Introduction to Political Parties and Practical Politics* (3rd Ed., 1924), 192-200.

<sup>13</sup> See Herbert Croly, *Marcus Alonzo Hanna* (1912), 209-227.

and labor could have added. The campaign of 1896 was not merely a party contest but also a test of methods, resulting in the triumph of the more carefully planned and executed campaign of McKinley. No presidential candidate since 1896 has attempted to duplicate on as grandiose a scale the Bryan performance. It is almost humanly impossible, and in addition does not secure the best results. Governor Smith's palatial train in the campaign of 1928 with its hundreds of experts and news reporters was a better organized and directed display than the Bryan effort.

After these preliminary party activities, which are unknown to the written constitution, have taken place, the more formal part of the procedure followed in electing the President comes into operation. Nine methods of election were proposed in the Convention: (1) by the governors of the states; (2) by the people; (3) nominations of one man from each state by the people and the selection of one of these by Congress; (4) by electors chosen by the people; (5) by electors chosen by the state legislatures; (6) by Congress; (7) by electors chosen by lot from Congress; (8) by six Senators and seven Representatives chosen by joint ballot by the two houses of Congress; and (9) by electors chosen as the several legislatures shall direct.<sup>14</sup> After much debate, it was finally decided that the legislatures should decide the method of choosing the electors and that each state should have as many\* as it has Senators and Representatives in Congress. James Wilson said that the mode of electing the President was the most perplexing question that came before the Convention.<sup>15</sup> Its solution has proved the least satisfactory of any part of the work of the Convention.

The constitutional method was changed in 1804 by the adoption of the Twelfth Amendment after the development of political parties which made it possible under the original method for the President and Vice-President to be elected from different parties.<sup>16</sup> The method of choosing the electors has been changed by the legislatures of the states several times. (1) At first they were chosen by the legislatures themselves. (2) Then, as more democratic tendencies developed, the legislatures decided to let the people choose the electors, the usual practice being to elect two from the state at large, called senatorial electors, and the others from Congressional districts. (3) It was later seen that, if all the electors

<sup>14</sup> See Hunt and Scott, *op. cit.*, 40, 41, 42, 79, 80, 267, 270, 285, 286, 287, 310, 311, 313, 317, 318, 320, 324, 461, 463, 464, 507, 514, 516, 517.

<sup>15</sup> Elliot's *Debates*, II, 511.

<sup>16</sup> Cf. *The Constitution*, Arts. II and XII.



were elected at large, they would likely be from the same party and hence the influence of the state in national politics would be increased. The result was the abolition of the district system.

The present method is for each party to nominate by state convention or primaries<sup>17</sup> a set of electors for each state equal to its total representation in Congress, except in Pennsylvania where the presidential candidates nominate and in Nebraska and Iowa where the state executive committees of the parties nominate. The names of these electoral candidates appear on the general ticket in the Presidential election and the people vote for them.<sup>18</sup> The names of the Presidential and Vice-Presidential candidates are generally on the tickets to designate the party affiliation of the electors. Each voter casts his ballot for all the electors that his state is allowed, though he is not compelled to vote for all the electors of any one party. He may split his vote but this is rarely done. In the United States no person can vote directly for President and Vice-President, but through the selection of the electors by the voters an indirect popular election is secured. The set of candidates which secures the plurality of the votes cast in a state is elected and is, therefore, the electoral college for that state. The total number of electors for all the states is 531 which equals the number of Senators and Representatives in the Congress of the United States.

The election for electors is held throughout the Union on the first Tuesday after the first Monday in November every fourth year, succeeding a Presidential election. The process of choosing electors is completely in the hands of the states with two exceptions: (1) the Constitution debarb any one holding an office of trust and profit under the United States from being an elector, and (2) Congress has prescribed the day for the election. The states are agents of the Union in this matter, and if they were to refuse to provide for an election of the national officers, Congress would undoubtedly establish a complete election system of its own.

The electors vote for President and Vice-President on the first Wednesday in January in accordance with a federal statute. The electors of each state meet at a place designated by the state legislature—always the state capitol—to vote. Since they are chosen

<sup>17</sup> Four states nominate electors by primaries: Florida, North and South Dakota, and Oregon.

<sup>18</sup> In Nebraska and Iowa, the names of the electors do not appear on the general ticket, but instead the names of the Presidential and Vice-Presidential candidates. The voter indicates his choice for President and Vice-President and the way the state goes determines which set of electors will cast the electoral vote of the state.

as party representatives, they vote for the candidates of their party, but they have the constitutional right to vote independently of party affiliation. They vote by ballot for the nominees of their party for President and Vice-President, "one of whom at least must not be an inhabitant of the same state with themselves." They then make two separate lists of the votes for President and Vice-President, sign, certify, and seal them, deposit one with the United States District Court for the district in which they meet, and send one to the President of the Senate by registered mail. The electors must also transmit their own election certificates approved by their respective governors as evidence of their legal competency to act. They then adjourn *sine die*. They are regarded as state officers and their expenses are paid by the states.

There are thus practically two methods for electing President and Vice-President—one actual and political and the other nominal and legal—one by the unwritten constitution and the other by the written Constitution—one popular and national in character and the other representative and federal. To give legality to the first it is constitutionally necessary for the second to be employed regardless of its perfunctory nature. There is, however, a possibility of conflict between the two since one is national and the other federal. That is, a candidate for the Presidency may indirectly receive a majority of the popular vote and at the same time receive only a minority of the electoral vote. This has happened twice in our history: in 1876 Tilden received more popular votes than Hayes and in 1888 Cleveland polled a larger vote than Harrison, but in both instances these candidates were defeated in the electoral college.<sup>19</sup> This is possible because the electoral vote of the various states may be based on very unequal majorities.<sup>20</sup> In case of conflict between the two, the electoral vote overrules the popular.

5. *Counting the Electoral Vote.* The Constitution fails to state the method to be employed in counting the electoral votes. It simply says, "The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall be counted."<sup>21</sup> Nothing was said about

<sup>19</sup> In the election of 1876 a partisan commission was appointed to canvass the electoral vote and decided all the contests in favor of Hayes.

<sup>20</sup> For instance, if candidate A should carry New York State by a small majority of 20,000, he would receive 45 electoral votes while candidate B might carry Pennsylvania by a majority of 300,000 but receive only 38 electoral votes. The total popular vote for these two states would give B 280,000 majority whereas A would receive a majority of 7 electoral votes and would be elected, so far as these states are concerned.

<sup>21</sup> Art. II, Sec. 1, p. 2.

this matter in the Convention of 1787 or in the revised method of electing the President and Vice-President provided by Article XII of the Constitution; however, the Convention just before adjourning in providing for putting the Constitution into effect said "that the Senators shall appoint a President of the Senate for the sole purpose of receiving, opening, and counting the votes for President." <sup>22</sup> This would seem to imply that Congress was not to participate in the counting but merely to witness it.

There was very little dispute about this matter for a third of century after 1787 and no serious trouble until 1876 when the election dispute arose between Tilden and Hayes. The most difficult matter in this dispute was to determine which set of electoral votes from Florida, South Carolina, Oregon, and Louisiana should be counted, from which states double returns had been received, each set of electors claiming to be properly chosen. Congress finally by law created an electoral commission composed of five Senators and five Representatives elected by their respective houses, and five justices of the Supreme Court, four of whom, two Republicans and two Democrats, were named in the act creating the commission and given the power to select the fifth justice. The four justices selected a Republican so that the commission consisted of seven Democrats and eight Republicans. The vote of the commission was seven to eight on all the disputes in favor of the Republican candidate, ending in the election of Hayes by a vote of 185 to 184 for Tilden. This was a purely extra-legal process and according to the most critical examination ended in the exercise of the electoral function by the commission regardless of the facts in the disputed cases. <sup>23</sup>

To avoid similar difficulties in the future, Congress by the Act of 1887 provided for the settlement of such disputes as follows: (1) "If any states shall have provided by law, before the election of electors, for the final determination of contests regarding appointment, and shall have determined all contests according to that law, its decisions shall be final, unless the regularity of the state's action is questioned by both houses, in which case the vote shall be rejected. (2) In case more than one return is received from any state the question is decided as follows: (a) If the state shall have determined that the votes forwarded in one return were

<sup>22</sup> Hunt and Scott, *op. cit.*, 560.

<sup>23</sup> For the details involved in these disputes and the workings of the commission, see J. Hampden Daugherty, *The Electoral System of the United States* (1906), 162-213.

given regularly, then those votes shall be counted. (b) If two authorities in the state, each claiming to be the proper authority, shall have determined that different sets of returns were given properly, then those electoral votes only shall be counted which the two houses of Congress agree were determined by the proper authority. (c) If the state shall have made no determination of contested electoral votes, then both houses of Congress may determine which electoral votes were given regularly; but, if the houses cannot agree, the votes of those electors whose appointment is certified by the governor of the state shall be counted.”<sup>24</sup> This law has never been tested by either practice or the courts. It recognizes the right of Congress to decide all disputes over the counting of the electoral votes which the state has not decided finally or has decided irregularly.

There are three very grave dangers involved in this law: (1) Constitutional lawyers doubt its constitutionality on the grounds that Congress is nowhere authorized expressly or impliedly to exercise any authority over the electoral colleges. (2) If the houses fail to concur in the acceptance of a vote of a state, it is lost altogether. To provide by law for a possible disfranchisement of an entire state is indefensible and invites corruption and trickery. (3) It is possible for the two houses to remain in deadlock over such a contest until after the fourth of March, thus vacating both the Presidency and Vice-Presidency.<sup>25</sup>

Normally the votes are counted on the second Wednesday in February following the meeting of the electoral houses in the presence of the two houses sitting jointly in the House of Representatives under the chairmanship of the President of the Senate, who opens the certificates from each state and hands them to two tellers from each house who read them to the Senators and Representatives. If there is no objection, the votes are recorded in the journals of the houses and the result announced. The persons receiving the greatest number of votes for President and Vice-President, provided it is a majority, are declared elected. In event of no election of President and Vice-President by the electoral colleges, the House of Representatives voting by states, each state having one vote, determined by the majority of its Representatives, elects a President from the three highest, a majority of the states being necessary to elect; and the Senate, voting as individuals,

<sup>24</sup> A. B. Hart and A. C. McLaughlin, *Cyclopedia of American Government* (1914), I, 659.

<sup>25</sup> Daugherty, *op. cit.*, 250-280.



elect a Vice-President from the two highest by a majority vote. The House has elected two Presidents: Jefferson and John Quincy Adams.

6. *Defects in the Present Method of Electing President and Vice-President.* Possibly no part of the Constitution has given less satisfaction than the part prescribing the method for the election of President and Vice-President. Yet the forefathers apparently were particularly proud of this part of it. They felt that the process of electing the President was so guarded as to guarantee that only the most able statesmen could be elected. Hamilton in speaking of this matter said: "The Process of election affords a moral certainty, that the office of President will never fall to the lot of any man who is not in an eminent degree endowed with the requisite qualifications. Talents for low intrigue, and the little acts of popularity, may alone suffice to elevate a man to the first honors in a single State; but it will require other talents, and a different kind of merit, to establish him in the esteem and confidence of the whole Union, or of so considerable a portion of it as would make him a successful candidate for the distinguished office of President of the United States. It will not be too strong to say, that there will be a constant probability of seeing the station filled by characters preëminent for ability and virtue."<sup>26</sup> It is generally admitted by informed Americans that the history of the Presidency does not sustain Hamilton's expectation. James Bryce said "from the time when the heroes of the revolution died out with Jefferson and Adams and Madison, no person except General Grant, had, down till the end of the last century, reached the chair whose name would have been remembered had he not been President, and no President except Abraham Lincoln had displayed rare or striking qualities in the chair."<sup>27</sup>

While the abolition of the independence of the electoral colleges by the development of political parties and the substitution of a political for the constitutional method of electing the President as a consequence are largely responsible for the general tenor of mediocrity in the Presidency, beginning about 1829, other factors have contributed to the same tendency.<sup>28</sup> The party system through

<sup>26</sup> *The Federalist* (Lodge Ed.), 426-27.

<sup>27</sup> James Bryce, *American Commonwealth* (Rev. Ed., 1921), I, 77.

<sup>28</sup> Apart from the electoral system, the unparalleled opportunities in business that the resources of the country have afforded have attracted the best brains of the nation and have lowered the standard of public service. The simple society of the early days of the Republic offered no such opportunities.

its insistence on regularity has destroyed the independence of not only the electors but also the voters. Parties are primarily interested in holding or securing the control of the government, and are, therefore, looking for successful candidates rather than able Presidents. As long as they can keep the voters from bucking their nominees, this will be the case. A party of political slaves is necessarily in the hands of the professional politicians whose interests are served by a candidate who can win at the ballot box regardless of his fitness for the presidential office. Since the politicians through the parties have almost a monopoly on the nominating system, the voters are left either blindly to follow their party leaders or boldly to cross party lines and vote for the best man as a means of showing the politicians that they must nominate able candidates for the Presidency. Of course, if both of the major parties become bankrupt in personnel at the same time, as sometimes happens, the voters are helpless, unless a new leadership comes to their rescue.<sup>29</sup> Herein then is found one of the major reasons why the Presidency under the party system has not been maintained on the level set by the electoral college in the early years of the Republic.<sup>30</sup>

The present electoral system practically gives the doubtful or pivotal states a monopoly on the presidential candidates. It is not necessary for the Republicans to nominate a candidate for the Presidency from Pennsylvania in order to carry this state nor do the Democrats have to select a candidate from Mississippi to secure its electoral vote. But the situation is very different in Ohio and New York. These states must be bought not only by selecting one of their citizens for a candidate but also by such an outlay of funds for campaign purposes as will guarantee the securing of their votes. The rest of the nation can be ignored as to candidates, campaign, and platform before election and as to patronage and consideration generally after election. Here again the slavery of a one party system works a tremendous financial loss to certain sections of the country as well as eliminating their statesmen from presidential possibilities. Here again the objective is not a President but a political victory. This situation has resulted from the giving of political solidarity to the state electoral colleges by the party system. Election of the President by popular vote would remedy this defect.

Undoubtedly the Presidency and the nation suffer from the short

<sup>29</sup> André Siegfried, *America Comes of Age* (tr. by H. H. and Doris Heming, 1927), 239-255.

<sup>30</sup> See Bryce, *op. cit.*, I, 77-84.

term for which the President is elected. This is true for a number of reasons. In the first place, the four-year term resulted from a compromise intended to prevent anticipated criticisms from frontier democrats who could see the shadow of a monarch amidst the complete absence of any such indications. The Convention of 1787 had constantly to sacrifice its opinions to expediency. It was not what they thought and knew was best but what they thought that the people would accept that frequently determined the character of their proposals. In the second place, the election is forced upon the American people at tremendous expense of time and money whether or not there is any reason for it. The major reason is frequently to offer the professional politicians an opportunity to wage a campaign for office. It matters not whether the party in power retains the Presidency as a result of the election, the turnover in the employees of the government follows and the politicians have their chance. The cost of this turnover in the labor supply for our public service is very heavy and frequently involves blunders and fraud that shake the confidence of the nation in its political institutions. No intelligently directed private business would think of pursuing such a policy. It practically amounts to running the government in the interest of the politicians instead of the nation. In the third place, a large portion of the President's time under the present system must be dedicated to playing the game with these politicians if he expects to accomplish much while in office or to be reëlected for a second term. They must be paid for their support, frequently with useless offices at the expense of the American people and efficient administration. Again, there can be no continuity of policy if the government remains under such a system. It is difficult after one administration for the people to see sufficient results of a certain policy to know whether it is working for the best interests of the nation. Yet the voters must pass upon its character under charges and counter charges based on prophecy. Such a system presents the appearance of a huge farce and makes government a matter of sport. Of course, among a people that spends millions on sports it may serve some purpose, but it is submitted in this connection that a committee on the rules of the game with military support should be appointed to complete the organization and increase the attendance. Statistics on non-voting seem to indicate that the American people are losing interest in this sport. Finally, it was undoubtedly the recognition of the objections to the four-year term of the President that caused the Southern statesmen to provide a six-year term with ineligibility for

reëlection for the President of the Southern Confederacy. It is believed that the adoption of some such scheme would increase the efficiency of the presidential office, strengthen the civil service, give continuity to the policy of the government, restore the lost dignity of the Presidency, relieve the nation of the burden of frequent elections, and free the voters from the autocracy of parasitic politicians.

7. *Presidential Succession.* The Constitution provides that "in case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President; and Congress may by law provide for the case of removal, death, resignation, or inability both of the President and Vice-President declaring what officer shall then act as President; and such officer shall act accordingly, until the disability be removed or a President shall be elected."<sup>31</sup>

Congress in 1792 provided by law that in case of removal, death, resignation, or disability of both President and Vice-President, the president *pro tempore* of the Senate should succeed and, if there was no president *pro tempore* of the Senate, the Speaker of the House should succeed. This law continued in force until 1886 despite its inadequacy and the fatal weakness of making it possible for a president *pro tempore* or Speaker of a different politics from that of the President or Vice-President to exercise the powers of the President and presumably change Cabinets. Furthermore, a vacancy might occur during the recess of Congress when there is no president *pro tempore* of the Senate or Speaker of the House. Indeed, the decade of 1880-1890 indicated that these possibilities were not so remote. In the autumn of 1881, before Congress had met and elected officers, President Garfield was assassinated and Vice-President Arthur succeeded to the duties of the President. In 1885 Vice-President Hendricks died before Congress had assembled, and hence before the Senate had elected its president *pro tempore* who could have succeeded if President Cleveland had died. The situation was further complicated by the fact that the Senate was Republican and, of course, would have elected a Republican President *pro tempore*, who, in case of President Cleveland's death, would have succeeded a Democrat. If Vice-President Arthur or President Cleveland had died before the meeting of Congress, the nation would have been without a legally chosen President. These possibilities not only exposed the

<sup>31</sup> Art. II, Sec. 1.



weaknesses of the law of 1792 but caused Congress to pass the Presidential Succession Act of 1886, which provides, in case of the death, resignation, inability, or removal of both the President and Vice-President, for the succession of the Cabinet officers, constitutionally eligible and appointed, in the following order: Secretary of State, Secretary of the Treasury, Secretary of War, Attorney General, Postmaster General, Secretary of the Navy, Secretary of the Interior, Secretary of Commerce, and Secretary of Labor.

There are still some defects in both the Constitution and the Law of 1886. The Constitution does not define "inability" or state who is to do so or who is to determine when such inability is removed. In the cases of the prolonged illness of Presidents Garfield and Wilson, this was a matter of considerable concern. There is no provision constitutional or otherwise to cover the case of the death of both the President and Vice-President elect. There is no provision by law for an election of a President in any of these contingencies before the regular election. In six instances, the Vice-President has succeeded to the full powers and dignities of the Presidency and in no instance has an attempt been made to call a special election despite the fact that the Constitution makes it possible to call an election in such contingencies. We have chosen rather to regard the Vice-President as President exercising the powers of the President temporarily. However, there is some reason for thinking that Congress in the Act of 1886 meant to leave this matter to the discretion of the Congress concerned.<sup>32</sup> It is doubtful whether contingencies of such far reaching consequences, however remote, should be left to the gods and godlings of partisan intrigue at the time of their occurrence.

<sup>32</sup> See Rodney L. Mott, *Materials Illustrative of American Government* (1925), 70-71.

## CHAPTER XIII

### THE PRESIDENT

#### HIS POWERS

The powers of chief executives are generally grouped into the two divisions of political and administrative. Whether the executive powers are primarily political or administrative depends on the relation of the executive to the legislative agent. For example, in Switzerland the powers of the executive are so completely under legislative control that they may be regarded as chiefly administrative in character. By political powers is meant those not subject to judicial control.

In the government of the United States the executive powers vested by the Constitution in the President<sup>1</sup> were regarded as primarily political. The President was expected to be a calm and non-partisan political chief, equally interested in the welfare of all sections, groups, and individuals, dispassionately enforcing all the laws in much the same spirit as the Chief Justice heads the judiciary, and exercising only such powers as are not subject to judicial control.<sup>2</sup> While the Constitution does not define the executive power, its conception was decided mainly from the powers exercised by the state governors in 1787 and was understood to include only the specific powers granted to the President by the Constitution, which may be classified as follows: (1) executive, (2) legislative, (3) military, (4) diplomatic, (5) treaty-making, and (6) judicial (pardoning power).

The fates, however, decreed that the President was not to remain the colorless sphinx which the Constitution had largely made him. In due time the practical workings of the government made of this constitutional corpse a thing of flesh and blood. He has become the directing head of the administration of the government, founder and premier of the cabinet, leader of his party, and the chief agent

<sup>1</sup> Art. II, Sec. 1.

<sup>2</sup> Frank J. Goodnow, *The Principles of the Administrative Law of the United States* (1905), 73.

of the public opinion of the nation which he largely creates and formulates. Then additional powers have resulted from necessity, statutes of Congress, judicial decisions, the party system, and the personality of the President.

1. *Executive Powers.* Executive powers is used here in a rather special sense to include the enforcement of the laws and the direction and supervision of the administration of the government. Before entering upon his duties, the President takes an oath or an affirmation to "preserve, protect and defend the Constitution of the United States." While this oath or affirmation does not increase his powers or impose any additional legal obligations, the fact that he is constitutionally required to take it would indicate that it was intended to add a moral obligation to his responsibility. His obligation is further emphasized by the requirement that "he shall take care that the laws are faithfully executed."<sup>3</sup> "In the fulfillment of the responsibility thus imposed", says Willoughby, "the President has, by necessary implication, the authority to use all the specific powers conferred by the Constitution upon him."<sup>4</sup> Through the use of the land and naval forces of the nation, by the institution of judicial proceedings against the violators of the laws, and by the protection of the officers of the government in the performance of their duties, he is able to maintain an effective operation of the government throughout the extent of its jurisdiction. Through successive acts of Congress and decisions of the Supreme Court, the President and the Federal Courts have been empowered to extend complete protection to federal officers in the discharge of their official duties by freeing them from state authorities, by transferring from state to federal courts, by *habeas corpus* proceedings, writs of error, or removal, cases in which they are accused of crime, and by punishing those who interfere with the performance of their duties. Under exceptional circumstances, the President has, without any special constitutional or Congressional authorization, the power to appoint agents to protect federal officials in enforcing obedience to law or respect for federal rights, privileges, or immunities.<sup>5</sup> While the President is limited in the exercise of his powers by the Constitution and the laws, he does not have to show statutory authority for everything he does. The government could not operate on such a narrow basis. There

<sup>3</sup> *The Constitution*, Art. II, Sec. 3.

<sup>4</sup> W. W. Willoughby, *The Constitutional Law of the United States*, II, 1151.

<sup>5</sup> *In re Neagle* (1890), 135 U. S. 1.

are many acts which must be performed, the need for which cannot be anticipated or their nature defined.

In addition to the President's power to enforce the laws by military force if necessary and to protect federal officials assisting him in the performance of this task, he has by congressional and judicial interpretation become the directing head of national administration. In the first place, he has the constitutional right "to require the opinion, in writing, of the principal officer in each executive department, upon any subject relating to the duties of their respective offices."<sup>6</sup> In the second place, it has been held that his constitutional obligation to take care that the laws be faithfully executed empowers him to compel federal officials properly to discharge their duties. In the third place, his power of appointment exercised with the approval of the Senate and his absolute power of removal<sup>7</sup> enable him to obtain administrative action though he may not have the legal power to command it. In the fourth place, the President must place an interpretation upon a law before proceeding to its enforcement and in so doing may materially affect its scope and effect. In the fifth place, he commissions the officers of the government and he has refused commissions to the appointees of his predecessor. Finally, the exigencies of efficient government have compelled Congress to grant the President the powers of administrative discretion and the courts will sustain his orders if possible.<sup>8</sup>

The President's powers of appointment and removal are his chief weapons in controlling the action of administrative officials. They also have far reaching political consequence since the President as head of his party is expected to use these powers to reward the faithful and to strengthen his political fortunes. The Constitution recognizes two classes of appointments which the President is required to make: (1) those chief federal officers provided for by the Constitution and the laws of Congress whose appointments require the approval of the Senate and (2) those inferior officers provided for by the laws of Congress whose appointment is vested in the President alone. Some of the officers of the latter class are, by the direction of Congress, appointed by heads of departments. The first class, however, is the more important and includes some 17,000 presidential officers, carrying an aggregate salary of several

<sup>6</sup> *The Constitution*, Art. II, Sec. 2.

<sup>7</sup> *Myers v. United States* (1927), 272 U. S. 52. See also Edward S. Corwin, *The President's Removal Power* (1927), 1-10.

<sup>8</sup> James T. Young, "The Relation of the Executive to the Legislative Power," *Proceedings of the American Political Science Association*, I, 47.



million dollars. These include the judges of the federal courts, cabinet officials, ambassadors, ministers, consular officers, members of important boards and commissions, and the postmasters of the large cities. Since the practice is for most of these officials to hold office for four years, any President will be forced to make a great many appointments.

In practice, the appointive power of the President is by the unwritten constitution largely exercised by the Senators and Representatives of the President's party in conjunction with the political leaders of their party in the various states. The Senators, Representatives, and these leaders, usually national or state committeemen of the party, agree on a distribution of the federal offices of their states, and support one another in inducing the President to nominate their candidates. If there is no Senator or Representative of the President's party in Congress from a state, the political boss of the President's party in such a state practically controls the appointments for that state.

There are five major reasons for the development of this system: (1) the constitutional provision making senatorial approval requisite for appointment; (2) the great expansion in the number of federal employees making it necessary for the President to depend upon others for the necessary information concerning prospective appointees; (3) the party system with its obvious consequences; (4) the President's greater interest in legislation which he can induce Senators and Representatives to support in return for appointments; and (5) the rule of "senatorial courtesy" by means of which any Senator can by voicing his opposition prevent the appointment of any federal official in his state since the other senators will support his position, thus making the approval of the President's nominee impossible. In serving the political interests of the Senators, the President realizes that he is promoting those of himself and his party. It comes to be, therefore, a matter of community of interests.

The removal power of the President has been a contentious subject in American politics at times and its nature has remained uncertain until the Supreme Court in the recent case of *Myers v. United States*<sup>9</sup> decided that it is absolute and extends to every presidential appointee except federal judges. The basis of this decision is: (1) that the power of appointment and of removal is a part of the "executive power"; (2) that the power of removal is incident to the power of appointment; (3) that Congress recog-

<sup>9</sup> 272 U. S. 52.

nized in 1789 that the Senate has no constitutional basis for participating in the removal of officers; (4) that Congress also recognized that it has no constitutional grounds for diminishing the President's power of removal; and (5) that the doctrine of separation of powers vests certain inherent powers in each department of the government which the others cannot abridge. The opinion of the court met with vigorous dissent from some of its more able members and has been criticized as resting primarily on erroneous history and fancied necessity, but it is likely to remain the law on this subject for some time notwithstanding.<sup>10</sup> It may be said to constitute the last step in the evolution of the President as the administrative head of the government, making him almost absolute over his subordinates and, therefore, responsible for their acts.

2. *Legislative Powers.* The Constitution gives the President the power to call extra sessions of Congress or either house, to adjourn it in case of disagreement between the two houses over adjournment, to give information to it on the state of the Union and to recommend for its consideration such measures as he thinks proper, and to veto all bills, orders, resolutions, or votes which require the concurrence of the two houses, except a vote to adjourn. The unwritten constitution has added the legislative influence of an English Prime Minister, if he is capable of exercising it, and the ordinance power of the King in Council.

(1) *Extra Sessions.* A presidential candidate frequently promises the American people in his campaign, in event of his election, to call Congress in extra session to pass certain urgent legislation which he is advocating. His election practically amounts to a mandate to Congress to enact the desired measures. He also exercises great influence over legislation passed at extra sessions to meet the demands of an emergency in the affairs of the nation. His power to call either house in session has special reference to the Senate in matters of treaty-making or appointments. Since he is now head of the Budget Bureau, he may find it desirable sometimes to call the House of Representatives in special session to prepare revenue bills as a means of expediting this matter, or for impeachment purposes. He cannot adjourn the two houses separately, but after Congress has adjourned, he could call either house in extra session, thus accomplishing the same end indirectly. It is conceivable that the President might more easily persuade the Senate to ratify a treaty whose execution called for financial legislation, if the House was not in session.

<sup>10</sup> Corwin, *op. cit.*, 10-50.

(2) Messages. The power of the President to furnish Congress information on the state of the Union and to recommend measures to meet the demands of the situation, according to an eminent authority, constitutionally authorizes "the President to construct and present regular bills and projects of law to the Congress."<sup>11</sup> The reason for his acting through messages delivered in writing or in person is undoubtedly due to the fact that the cabinet members are not allowed to represent him on the floor of Congress. The President's message, however, is an effective instrument in the legislative process. It is generally printed in full in the leading papers of the nation and is widely and ably discussed on the editorial page. The members of Congress are likely to follow the impression that it makes upon the nation. The message is generally rather representative of the opinion of the country because it is the result of conferences with party leaders and the heads of many private organizations. It is always certain of considerable support, and it is easier to follow its suggestions than to evade them.

Washington and Adams delivered their messages in person; but Jefferson, who disliked display and lacked facility in speaking, preferred to send written messages to Congress. The precedent of Jefferson was followed until President Wilson, feeling that the President should play the rôle of an English prime minister, reverted to the practice of Washington, which has since been followed because the oral message is more effective. It is delivered to both houses in joint session under rather effective dramatics. "Oral addresses," says Ex-President Taft, "fix the attention of the country on Congress more than written communications, and by fixing the attention of the country on Congress, they fix the attention of Congress on the recommendations of the President."<sup>12</sup>

(3) The Veto. The Constitution provides three ways by which a bill after having been passed by a majority of both houses of Congress may become a law: (1) by the approval and signature of the President; (2) by being repassed by a two-thirds majority of Congress in case of the President's veto; and (3) without the President's signature by lying on his desk for ten days (Sundays excepted) provided Congress has not adjourned in the meantime. The President has two vetoes: (1) the suspensive veto which may be overridden by a two-thirds majority of both houses and (2)

<sup>11</sup> John W. Burgess, *Political Science and Comparative Constitutional Law*, II, 254.

<sup>12</sup> William Howard Taft, *Our Chief Magistrate and His Powers* (1916), 40.

the pocket veto which is exercised by refusing to sign and return a bill presented to him within the last ten days of a session of Congress. The pocket veto is absolute since Congress, having adjourned, has no chance to override it. A vetoed bill is returned to the house wherein it originated, accompanied by a veto message stating the objections to the bill.

The veto power is a relic of the legislative power formerly possessed by European monarchs and is as thoroughly legislative in character as the power of either house of Congress to refuse to pass the measures of the other.<sup>13</sup> The Constitution fails to state the reasons for which the veto may be used. The President may, therefore, veto a measure because he does not like it, or because he thinks it inexpedient or probably injurious in its effects or unconstitutional.

The effectiveness of the veto depends upon the leadership of the President and the political coloring of the Congress. If the President's party is in power, and he is its leader, it is not likely to override his veto. It requires only one vote more than one-third of either house to prevent the overriding of the veto. The veto was intended to be a negative to unwise legislation, but it has acquired a positive use. A President no longer hesitates to inform Congress in advance of the passage of a bill that he will veto it if he dislikes it as a whole or any part of it. If Congress thinks that it would be unable to override his veto, it is likely to drop the bill or modify it in accordance with his wishes. "The veto power", says an eminent authority, "taken in connection with the message and the appointing power, is an effective political instrument in the hands of the President. By threatening to use the veto, he may secure the passage of bills which he personally favors. By holding up appointments to federal offices he may bring congressmen to terms. At all times, in considering important measures, Congress must keep in view the possible action of the President, especially where a party question is involved and a correct attitude before the country is indispensable."<sup>14</sup>

(4) The Ordinance Power. The President of the United States exercises an extensive ordinance power which is more frequently legislative than administrative in character.<sup>15</sup> His ordinances to

<sup>13</sup> Edward Campbell Mason, *The Veto Power* (1891), 11-23.

<sup>14</sup> Charles A. Beard, *American Government and Politics* (5th Ed., 1928), 211.

<sup>15</sup> By virtue of the power of removal, the President issues ordinances of an administrative character which the courts regard as political in nature and will not enforce. Goodnow, *op. cit.*, 84-85.



have effect of law must be in pursuance of a power expressly or impliedly granted him by the Constitution or an act of Congress. These ordinances fall into three classes: (1) Proclamations of a warning and informative character not necessarily authorized by either the Constitution or statutes but based on precedent or the discretion of the President. They do not impose a legal command and include such matters as proclamations of neutrality and the announcement of the admission of a state into the Union, or the ratification of a treaty affecting the dealings of private persons, or intended action of the executive department, such as assuming control of the transportation system of the country, or the appointment of a day of public thanksgiving. (2) Ordinances in pursuance of Congressional authorization and deriving their legal effect from Congress and not the President. They generally provide the details for the enforcement of statutes and are a delegation of legislative power to the President by Congress. Examples of this class of ordinances are the executive regulations governing the conditions under which the returns on income taxes may be treated as public records and open to inspection by interested parties and the suspension or modification of tariff laws depending on reciprocal trade relations with foreign countries. (3) Ordinances of the President based on explicit or implied powers granted him by the Constitution, and, therefore, having the effect of law. In this group falls the power of the President to call both houses of Congress or either of them into extra session and to prorogue them in case of their disagreement over the time of adjournment. The President's power to "grant reprieves and pardons for offenses against the United States" amounts to the nullification of the effects of the laws of Congress and decisions of the Supreme Court of the United States. Of course, it is in respect to his war powers that his ordinance power is greatest. These are discussed more fully later; suffice it to say here that his ordinances in this connection may touch the lives, the liberty, the property, the food, clothing, comfort, habits, and business of American citizens and the aliens within our borders. These orders are issued either by the President or by his subordinates to whom he has delegated the necessary authority, and they rest on constitutional authority or existing acts of Congress or new acts passed to meet the exigencies of the situation. The necessities of war make such action necessary. It should be stated, however, that Congress never grants a blanket authority to the President in such matters comparable to that conferred by the Defense of the Realm Consolidation Act of 1914 on

the King in Council in Great Britain (the cabinet). Congress usually limits the President by specifications of details including limitation of time.<sup>16</sup>

"Few people," says an expert on national administration, "are aware of the great extent to which public administration in the United States national government is controlled by means of administrative regulations or orders, in the nature of subordinate legislation."<sup>17</sup> "Certainly since Congress in 1917-18 endowed President Wilson with multitudinous extraordinary powers involving the exercise of exceptionally broad discretion," says a recent authority, "the general public as well as the closeted scholar has begun to realize that it is an unreal fiction that the President cannot legislate."<sup>18</sup>

3. *Military Powers.* The scope and character of the President's war powers can only be understood in connection with those auxiliary powers which may be used to initiate or terminate war. The sources of his war powers are (1) the Constitution, (2) acts of Congress, and (3) inherent executive powers. The Constitution makes him commander-in-chief of the army and navy, and the militia when called into the service of the United States.<sup>19</sup> He, therefore, has the power to name and commission the officers of the military forces of the nation, to remove them in time of war, and to place the army and navy wherever he sees fit. The latter step may easily provoke war. Congress may by legislation increase the army and navy, thereby increasing the President's powers, or it may decrease the military forces, having the opposite effect; but in either case the President in effecting the will of Congress must exercise considerable discretionary power. In enforcing the Constitution, laws, and treaties of the United States, the President may use the military forces of the nation. "The entire strength of the nation," said Justice Brewer, speaking for the majority of the Supreme Court, "may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights intrusted by the Constitution to its care. The strong arm of the government may be put forth to brush away all obstruc-

<sup>16</sup> Henry Campbell Black, *The Relation of the Executive Power to Legislation* (1919), 116-148.

<sup>17</sup> John A. Fairlie, "Administrative Legislation," 18 *Michigan Law Rev.*, 182.

<sup>18</sup> James Hart, *The Ordinance Making Powers of the President of the United States* (1925), 19-20. See also Lindsay Rogers, "Presidential Dictatorship in the United States," *Quarterly Review*, January, 1919.

<sup>19</sup> Art. II, Sec. 2.

tions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the nation, and all its militia, are at the service of the nation, to compel obedience to its laws." <sup>20</sup>

The powers of the President relating to war may be grouped as follows: (1) powers relating to the beginning of war; (2) powers in time of war; and (3) powers relating to the termination of war.

(1) Powers Relating to the Beginning of War. The President's powers to bring about war are potentially very great, and involve the following important subjects: (a) foreign affairs, (b) national defense, and (c) declaration of war. The foreign policy of the nation, largely determined by the President, may be conciliating and compromising or antagonistic and aggressive. His power to grant or refuse recognition to foreign governments, to sever diplomatic relations with other nations, and to make executive agreements with the heads of other governments may be exercised in the interest of either peace or war. Of course, the President has the right to employ the military forces of the nation to aid the civil authorities, to protect the "inchoate interests" of the United States, and to safeguard the lives and property of American citizens abroad. He undoubtedly has the power to initiate a defensive war. The Convention of 1787 was careful to distinguish between making war and declaring war, recognizing that the President might have to engage in war before Congress could declare war. An example of how the President can approach war without a declaration of war by Congress and, therefore, without technically engaging in war, was to be seen in the part he played in the little family affair of the sixties. Constitutionally it was only a sort of athletic bout between brothers, but actually it was war. The punitive expeditions of the President furnish another illustration of his war-making power. The war between the United States and France in 1799, without a declaration of war by either power, is also in point. The President's part in a declaration of war is always a factor and may be controlling. In the first place, he has the facts in the case and may use such as will support his recommendations. In the second place, in presenting his war message to Congress, he may color the facts by an interpretation to suit his purposes. In the third place, the nation may already be at war before the President recommends war, thus making it almost compulsory for Congress to declare

<sup>20</sup> *In re Debs* (1895), 158 U. S. 564. See also *In re Neagle* (1890), 135 U. S. 1, and *Fong Yue Ting v. United States* (1895), 149 U. S. 698.

war or recognize a state of war existing. The fact is that Congress has never failed to declare war when the President recommended it. Of course, he may prevent war by refusing to call Congress in extra session or by withholding information from it. Since a declaration of war passes through all the stages of a statute, he can either approve or veto it. It is also his duty to give notice of a declaration of war to neutrals. It is not intended to say that our Presidents have abused their war-making powers, but rather to show that they have such powers, that they have exercised them, and that they may practically compel Congress to follow their initiative in these matters.

(2) Powers in Times of War. The President's powers both military and civil are necessarily increased during actual war. These powers, primarily belonging to Congress, are of such a nature as to force it to leave to the President considerable discretion in their exercise. While Congress generally provides for the organization of armies, its acts amount to little more than a commission to the President as commander-in-chief to perform the task. The size of the army, the character, number, and personnel of its divisions, and the means of its operation, are left to his determination.

As commander-in-chief of the armed forces of the nation, he has not only the right to command in person, a right actually exercised by Washington, but the power to give orders to his subordinate officers, to control the movements of the forces, to choose the place of battle, to establish blockades, to order invasion of the territory of the enemy, to establish control over it, to employ secret agents, and to dismiss and appoint officers.<sup>21</sup>

He also exercises extensive military jurisdiction through courts-martial and military commissions. Courts-martial are authorized by statute, but are created and dissolved by executive authority, and exercise jurisdiction over offenses against military law. Military commissions are organized by the President, their jurisdiction is not fixed by statute, and they try civilians as well as military persons who violate the common laws of war. They may be used as a substitute for local civil courts. The President or his subordinates convenes these tribunals, controls their procedure, and may largely determine their findings. He may review their holdings and mitigate their punishments or by pardon annul their decisions.<sup>22</sup>

<sup>21</sup> Charles E. Hughes, "War Powers under the Constitution," 85 *Central Law Journal*, 206-214.

<sup>22</sup> Clarence A. Berdahl, *War Powers of the Executive in the United States* (1921), 138-164.



The President as commander-in-chief is by the laws of war empowered to establish military government<sup>23</sup> over invaded territory as a means of protecting his own forces and the lives and property of the people of the invaded territory. Military supersedes local law to whatever extent the exigencies of the situation require and is "exercised by the military commander under the direction of the President, with the express or implied sanction of Congress."<sup>24</sup> The President is bound only by the laws of war,<sup>25</sup> decides when such a government may be established,<sup>26</sup> gives it such powers as he sees fit, determines whether it shall be legislative, executive, or judicial in character, and appoints and removes its officers at will. His powers in this connection have been characterized as "an absolutism of the most complete sort."<sup>27</sup>

The expansion of the administrative machinery of the government in time of war greatly increases the civil powers of the President. During the Great War the President designated the time, place, and rules for the registration of the men included in the draft acts; established for this purpose machinery reaching each voting precinct of the nation; and appointed the officers to perform this task and fixed their duties and jurisdiction. By acts of Congress he was given control of the food, fuel, and transportation system of the nation. Since war has become more a matter of resources than of men, his economic control of all business affected with a public interest, a well recognized principle of American constitutional law in time of peace, is always tremendously increased by the necessities of war.<sup>28</sup>

(3) Powers Relating to the Termination of War. The President as commander-in-chief has complete control over the preliminaries involved in closing a war such as the terms of the armistice and protocol which largely determine the policy to be followed in the treaty of peace. He may order demobilization at his pleasure and conduct the peace negotiations in person or through representatives appointed without Senatorial approval. If he does not attend the peace conference in person, he maintains constant touch with its proceedings and does not hesitate to

<sup>23</sup> Military government is that dominion exercised by a belligerent power in time of war over an invaded territory and its inhabitants.

<sup>24</sup> *Ex parte Milligan* (1866), 4 Wallace 2.

<sup>25</sup> *Dow v. Johnson* (1879), 100 U. S. 158; *Dooley v. United States* (1901), 182 U. S. 222.

<sup>26</sup> *Hornsby v. United States* (1869), 10 Wallace 224.

<sup>27</sup> *The Grapeshot* (1869), 9 Wallace 129; *Mechanics Bank v. Union Bank* (1874), 22 Wallace 276.

<sup>28</sup> Berdahl, *op. cit.*, 167-214.

change his position, to make new demands, or lay down ultimatæ. The treaty of peace in so far as it relates to the United States is exclusively of his making when it is sent to the Senate, and unless it violates the traditions of the nation it will likely be ratified in the form transmitted to the Senate. So it happens that the closing of a war may be quite as much an act of the President as the making of war. Moreover, reconstruction following war is also under his direction. The Supreme Court has held that "the power [to carry on war] is not limited to victories in the field. . . . It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress."<sup>29</sup>

4. *Diplomatic Powers.* The power to nominate and commission the diplomatic and consular agents of the United States is exclusively vested in the President while the power to "appoint" is shared with the Senate. The exact language of the Constitution is: "He shall nominate, and by and with the advice and consent of the Senate, shall appoint, ambassadors, other public ministers and consuls . . . and shall commission all the officers of the United States."<sup>30</sup> The language of the Constitution is not any too clear and has led the Senate to claim the right to participate in the nominations while apparently its action is restricted to the approval or disapproval of the President's nominations only by means of a vote. During a recess of the Senate the President may appoint these officials alone and commission them for terms which may extend to the expiration of the next session of the Senate. It is, of course, implied but not required that he shall make nominations for permanent appointments to such places at the next following session of the Senate. It is also implied from the principle of the President's responsibility for the enforcement of the laws of the nation that he has the power to suspend or dismiss any diplomatic or consular agent from its service.

The President is also charged by the Constitution with the responsibility of receiving the ambassadors and other public ministers of foreign powers. While a part of this duty is purely ceremonial, in other respects it may have far reaching consequences. "In discharging it," said a recognized authority, "the President may refuse to receive an ambassador or public minister from a particular organization claiming to be an independent state; or he may refuse to receive a particular person as ambassador from a

<sup>29</sup> *Stewart v. Kohn* (1870), 11 Wallace 493, 507.

<sup>30</sup> *The Constitution*, Art. I, Sec. 10.

state whose independence has been already universally recognized; or he may dismiss or demand the recall of any ambassador or public minister. Furthermore, in the discharge of this duty, the President may recognize, in the first instance, the independence of a foreign state.”<sup>31</sup> The dismissal of a foreign ambassador or minister for personal reasons is not serious, but for political reasons, it is a hostile act. The recognition of the independence of a political organization that has overthrown a legitimate government amounts to the encouragement of revolution and the instability of political institutions in general. Of course, as a check on a Presidential policy of this kind, the Senate may refuse to make treaties with such states or to approve the nomination of ministers to them, and Congress may refuse to create diplomatic posts at their capitols or vote their salaries. The far reaching influence of the President’s power of recognition was illustrated in Roosevelt’s hasty recognition of Panama and Wilson’s refusal to recognize Huerta and his announcement that he never would.<sup>32</sup>

The President through the Department of State is the sole agent of communication between the United States and foreign nations. “He is bound in such correspondence,” said a former President, “to discuss the proper construction of treaties. He must formulate the foreign policies of our government. He must state our attitude upon questions constantly arising.”<sup>33</sup> It was by this process that the Monroe Doctrine and the Open Door Policy in China, the only outstanding foreign policies of our government, were formulated and made known to the world. Neither the Senate nor Congress as a whole had anything to do with either. When it is recognized that the military arm of the government may be used by the President to sustain his policy without express Congressional authority, the true significance of his diplomatic powers may be appreciated.

5. *The Treaty-Making Power.* The scope of the treaty-making power is very extensive. Our form of government could not be changed by a treaty. “It also seems clear”, says Burdick, “that the national government cannot do by means of a treaty what it is expressly forbidden in the Constitution to do at all. Thus it would seem that it could not by treaty abolish the writ of *habeas corpus*, or institute bills of attainder, or levy a capitation tax except in

<sup>31</sup> Burgess, *op. cit.*, II, 257.

<sup>32</sup> Quincy Wright, *The Control of American Foreign Relations* (1922), 268-271.

<sup>33</sup> Taft, *op. cit.*, 113.

proportion to the census, or tax exports from a State, or give a preference to the ports of one State over those of another, or provide for titles of nobility. Nor could it by treaty establish a state church, or provide for promiscuous searches, or do away with indictments or jury-trials in criminal cases, or do any of the things forbidden in the first eight amendments.”<sup>34</sup>

While a treaty cannot directly appropriate money, the fact is that Congress has never failed to satisfy the financial provisions of any treaty. The Senate, of course, is already committed through its approval of the treaty, and the House, though frequently protesting and asserting its discretion in such matters, has always chosen to exercise its discretion in favor of such a treaty.<sup>35</sup> There is no constitutional method by which the House could be forced to join the President and Senate in making provisions for the execution of obligations in any treaty which is not self-executing. It is a plain case in which two parts of the supreme law of the land conflict, since the House enjoys the exclusive right of originating revenue bills.<sup>36</sup> The unwritten constitution eliminates the conflict in favor of the supremacy of the President and Senate.

Since treaties are a part of the supreme law of the land,<sup>37</sup> any treaty whose terms are self-executing has the full force of law, and, therefore, repeals any act of Congress in conflict with it. A treaty may invade the field of the powers of Congress or the reserved powers of the states even though an act of Congress could not have such an effect.<sup>38</sup> A treaty may assign powers to Congress which it otherwise could not exercise. While an act of Congress may supersede a treaty as a matter of municipal law, the international obligation assumed under a treaty remains binding, and its non-fulfillment might lead to international complications. Such a situation would be particularly embarrassing to the President.

The scope of the treaty-making power is not defined by the Constitution and its limitations can be discovered only in the general theory of the government.<sup>39</sup> “That the treaty-making power of the United States extends to all proper subjects of negotiation

<sup>34</sup> *The Law of the American Constitution*, 71.

<sup>35</sup> S. B. Crandall, *Treaties, their Making and Enforcement* (2d Ed., 1916), Ch. XII; C. H. Butler, *The Treaty Making Power of the United States* (1902), *passim*, and Ralston Hayden, *The Senate and Treaties* (1920), *passim*.

<sup>36</sup> *The Constitution*, Art. I, Sec. 7.

<sup>37</sup> *Ibid.*, Art. VI.

<sup>38</sup> *Hauenstein v. Lynham* (1879), 100 U. S. 483; *Missouri v. Holland* (1920), 252 U. S. 416; *Asakura v. Seattle* (1924), 265 U. S. 332.

<sup>39</sup> See Edward S. Corwin, *National Supremacy*, 205-238.



between our government and the governments of other nations", said Justice Field, "is clear."<sup>40</sup> Furthermore, in interpreting treaties the courts in cases of doubt are inclined to deal liberally with them. "Treaties are to be construed in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred."<sup>41</sup>

Such being the nature of the treaty-making power, it is clear that the President, who enjoys the initiative in its exercise and is by no means a negligible factor at any stage of the treaty-making process, can through this channel exercise a very broad influence over the destiny of the nation. Since the treaty-making function is largely covered in connection with the special functions of the Senate,<sup>42</sup> it remains only to notice that the President, if he is a dominating figure in his party, may be able largely to control the Senate in the treaty-making process and thus exercise this power by himself.

Moreover, in recent years he has as a means of evading the Senate resorted to the practice of making "executive agreements," which for practical purposes in certain instances may answer the purposes of a treaty.<sup>43</sup> A still more informal arrangement is a gentleman's agreement between executives of governments to effect certain purposes about which no official correspondence takes place. President Roosevelt and the Premier of Japan regulated Japanese immigration to the United States by this method and the agreement was continued in effect by Presidents Taft and Wilson. There is no head of any other nation that exercises the control over its foreign affairs as completely as the President of the United States controls the international relations of the United States.

6. *The Judicial Power.* By the Constitution the President is given power "to grant reprieves and pardons for offenses against the United States except in cases of impeachment."<sup>44</sup> This power cannot be limited by Congress and may be exercised any time after the offense has been committed, either before or after trial

<sup>40</sup> *Geofrey v. Riggs* (1890), 133 U. S. 258.

<sup>41</sup> *Asakura v. Seattle* (1924), 265 U. S. 322, 342. See also Burdick, "Treaty-Making Powers and the Control of International Relations," 7 *Cornell Law Review*, 34.

<sup>42</sup> See Ch. XX.

<sup>43</sup> J. F. Barrett, "International Agreements Without the Advice and Consent of the Senate," 15 *Yale Law Journal*, 18, 63 (1905), 435, 528.

<sup>44</sup> Art. II, Sec. 2.

or conviction.<sup>45</sup> A pardon may be absolute, conditional, or partial. The President may grant general amnesties to classes of individuals.<sup>46</sup> A reprieve has the effect of deferring the day of execution in capital cases.

The President may be said to exercise a judicial power when he vetoes acts of Congress for constitutional reasons. "In considering a bill presented to him for signature," said President Taft, "it is the duty of the President of course to veto a bill no matter how much he approves its expediency, if he believes that it is contrary to the constitutional limitations upon the power of Congress."<sup>47</sup> If this is a judicial power when the courts exercise it, it must partake of the same character when the President exercises it. It is either judicial or legislative in both instances. The nature of the power and not the agent is the controlling factor.

In suspension of the writ of *habeas corpus* in times of rebellion or invasion it would seem that the President exercises judicial power. President Lincoln made use of this power and justified his exercise of it. President Taft, now Chief Justice of the United States, in speaking of Lincoln's action, said: "This claim of right to suspend the writ of *habeas corpus* I venture to think was well founded."<sup>48</sup> Other authorities doubt that the President can exercise this authority without the permission of Congress.<sup>49</sup>

In concluding this discussion of the President's powers it seems fitting to quote from one who has exercised them: "The Constitution does give the President wide discretion and great power, and it ought to do so. It calls from him activity and energy to see that within his proper sphere he does what his great responsibilities and opportunities require. He is no figurehead, and it is entirely proper that an energetic and active clear-sighted people, who, when they have work to do, wish it done well, should be willing to rely upon their judgment in selecting their Chief Agent, and having selected him, should entrust to him all the power needed to carry out their governmental purpose, great as it may be."<sup>50</sup>

<sup>45</sup> *Ex parte Garland* (1886), 4 Wallace 333, and *United States v. Klein* (1871), 13 Wallace 128.

<sup>46</sup> See "The Power of the President to Grant a General Pardon or Amnesty for Offenses Against the United States," 8 *Am. L. Reg.*, 513 and 577.

<sup>47</sup> *Op. cit.*, 19.

<sup>48</sup> *Ibid.*, 147.

<sup>49</sup> Burdick, *op. cit.*, 85.

<sup>50</sup> Taft, *op. cit.*, 157.

## CHAPTER XIV

### THE PRESIDENT'S CABINET

#### I. THE EVOLUTION OF THE CABINET IDEA

The President's Cabinet is an extra-legal institution that custom has grafted onto the formal executive machinery established or implied by the Constitution. The Founding Fathers were familiar with the English Cabinet and the Colonial Council that was associated in an advisory capacity with the American Colonial Governor. These precedents while they provided desirable features offered at the same time opportunities for executives to evade their responsibilities. The Forefathers attributed a large part of their difficulties to irresponsible executives. On the other hand the experience of the Americans in managing their own affairs from 1774 to 1781 convinced them of the necessity of having executive heads of departments and a chief executive for the nation. The exigencies of this period forced Congress in the interest of efficiency and the successful prosecution of its cause to create committees, boards, and agencies, and finally to substitute for these executive heads of departments.<sup>1</sup>

During this same period the idea of the association of these heads of departments was in process of development. The first time in American history that an advisory council to Congress was suggested was in 1781 when it was proposed that the heads of departments could "facilitate the business of Congress, if they were frequently to meet together to deliberate and then lay their opinions and plans before Congress."<sup>2</sup> It was again suggested that "they might meet frequently together, consult what ought to be done, and submit their sentiment to Congress."<sup>3</sup> Possibly the most significant suggestion made during this period embodying the idea of an advisory executive council is found in Pelatiah Webster's scheme of revising the Articles of Confederation. He

<sup>1</sup> H. B. Learned, *The President's Cabinet* (1911), 48-50.

<sup>2</sup> *The Pennsylvania Packet*, February 10, 1781.

<sup>3</sup> *The Pennsylvania Gazette*, April 11, 1781.

suggested a council of state composed of great ministers, who as heads of departments would "be able to give the best information to Congress."<sup>4</sup>

In the Convention of 1787, there were two theories of the Executive advanced. The theory of Roger Sherman of Connecticut was that the Executive should be the administrative agent of Congress, and, therefore, should be appointed and removable by it. This theory was supported by Charles Pinckney, Rutledge, and Mason. This was the European conception of an executive, and, if it had been adopted, it would doubtless in the course of time have ended in something close akin to the cabinet system. Sherman proposed that a council should be associated with the executive, stating that "even in Great Britain the King has a council."<sup>5</sup> The other theory was in line with the doctrine of separation of powers. It was proposed by James Wilson and supported by Madison and Gouverneur Morris. It contended that the Executive should be a representative of the people, independent of Congress, and, should serve as a check upon it. This was Montesquieu's type of Executive. Wilson believed that a council associated with the Executive would enable him to evade his responsibility. The adoption of the Wilsonian theory by the Convention prevented the Constitution from containing any suggestion of the cabinet idea.

## II. THE CREATION OF THE CABINET BY GEORGE WASHINGTON

The Constitution merely states that the President "may require the opinion in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices."<sup>6</sup> It should be noticed that this phraseology does not grant the President the authority to call the heads of departments together as an advisory council. He is to communicate with them individually only in writing. There is no idea of a collective or collegial body advising orally with the President about either matters of the respective departments or its members or general matters affecting the policy of the government as a whole.

Washington very early in his administration began to ask the Secretaries for both their oral and written opinions on various matters. By the close of 1790 Jefferson had filed twelve opinions in writing with the President. Washington in 1791 while on a tour

<sup>4</sup> *American History Leaflets* (Ed. by Hart and Channing), No. 28, 10.

<sup>5</sup> Hunt and Scott, *The Debates in the Federal Convention of 1787*, 50.

<sup>6</sup> Art. II, Sec. 2.



of the South suggested the first meeting of the Secretaries. In accordance with this suggestion, the Secretaries of State, Treasury, and War, together with the Vice-President, held a meeting on April 11, 1791, and discussed loans, commerce, foreign relations, appointments, and frontier troubles. Jefferson made a careful report of the proceedings of the meeting to Washington. Several such meetings were held in 1792, with the President presiding, and during 1793 this practice became a regular method of procedure. By the close of 1793, therefore, the Cabinet was established.

The first use of the term "cabinet" to apply to these meetings was in 1793. Jefferson in a letter of May 12, 1793, spoke of "our council" and on May 19, he referred to "our conclave." Madison, however, on June 13, spoke of the "discussions of the cabinet."<sup>7</sup> The term was frequently used in 1794 and 1795 by the Secretaries, by statesmen generally, and by the newspapers.<sup>8</sup> The term "cabinet" was first used in statutory law February 26, 1907.

### III. THE DEVELOPMENT OF THE CHARACTERISTICS OF THE CABINET

The American Cabinet, if indeed it can properly be called a cabinet, is a unique institution in its make-up and relationships. Its evolution is peculiarly American. Washington selected his Secretaries on a basis of friendship and personal fitness. Since political parties had not yet developed, political affiliation was not a factor in determining his choice. In fact he conceived of himself as a non-partisan President of all the people and felt that diversity of opinion would be desirable. There developed, however, during the course of his administrations such antagonisms between Hamilton and Jefferson over the policies of the government that the situation was frequently embarrassing. Harmony was finally restored by the resignation of Jefferson. It was soon demonstrated that the best of results required an undivided cabinet. Political solidarity became a requisite of the Cabinet in the administration of John Adams; in fact, during the latter part of his administration, the Cabinet came to consist of anti-Hamilton members of the Federalist Party. A coalition cabinet in times of a crisis as was the case with the Lincoln Cabinet has seemed desirable. At times individuals from the opposition party, who, however, were in sympathy with the President's policies, have been invited to cabinet

<sup>7</sup> Learned, *op. cit.*, 136-137.

<sup>8</sup> *The American Mercury*, Oct. 14, 1795.

posts. This was true of the cabinets of Roosevelt and Wilson. In such instances these persons have been representatives of groups or factions who supported the candidacy of the President in the previous election.

During the early period the idea of the President as head of the cabinet rather than some one of its members or an outsider was gradually established. Hamilton expected as Secretary of the Treasury to be the head of the cabinet. He asked his friends to speak of him as First Lord of the Treasury, evidently thinking in terms of the English Cabinet. John Adams finally discovered that Hamilton, who was not a member of his Cabinet, was actually controlling it. Hamilton in 1800 said: "A President is not bound to conform to the advice of his ministers. He is even under no positive injunction to ask or require it. But the Constitution presumes that he will consult them; and the genius of our government and the public good recommend the practice. As the President nominates his ministers, and may displace them when he pleases, it must be his own fault if he be not surrounded by men who, for ability and integrity, deserve his confidence. And if his ministers are of this character, the consulting of them will always be likely to be useful to himself and to the state." The principle of Cabinet subordination to the President in contradistinction to the English type of cabinet responsible to Congress may be said to have been established by the administration of John Adams.<sup>9</sup> Usually harmony has prevailed between the President and the Cabinet as a result of this, although at times even under strong Presidents various members of the Cabinet have attempted to dictate to the chief executive.

The principle of geographical distribution and representation of different sections of the country as a basis of selecting the Cabinet was introduced by President Monroe.<sup>10</sup> This feature added party strength and confidence on the part of the nation in the administration. Jackson used to speak of his "cabinet proper," thus admitting that he had a "kitchen cabinet" by means of which he had ministers without portfolio and elevated the political standing of an additional group of his friends.

The principle of changing Cabinets even though the same party remained in power was soon recognized. John Adams retained Washington's Cabinet at first, but was later forced to select advisors in harmony with his own views. Party factionalism as well

<sup>9</sup> M. L. Hinsdale, *A History of the President's Cabinet* (1911), 31-37.

<sup>10</sup> *Writings of Monroe*, II, 347.

as the desire on the part of Presidents to receive the entire credit for the work of their administrations made this practice desirable. Vice-Presidents on succeeding to the duties of the Presidential office have generally retained the Cabinets of their predecessors, and have continued their policies without radical changes.

In recent years the principle of making the Cabinet representative of big business has begun to operate. This was particularly true of the Taft, Harding, and Coolidge administrations. In view of the close relation of government to business this practice is justifiable, but the President should be strong enough to see that such relation does not prevent the government from being the champion of the public's interest at all times.

#### IV. THE PRINCIPLES GOVERNING SELECTION OF CABINET MEMBERS

While the President appoints the heads of the executive departments with the approval of the Senate, the selection of Cabinet members is made in accordance with the principles of the unwritten constitution. According to the written Constitution the President does not have to use a Cabinet. It is true that he has chosen to advise with the heads of departments, but he has at times called the Vice-President into the Cabinet. He could use the Speaker of the House or Members of Congress without violating any provision of the written Constitution.

The unwritten constitution, however, contains some rather definite provisions which largely govern Cabinet selections. These may be tabulated under eight heads: (1) The President must have a Cabinet. The unwritten law enforced by public opinion would not tolerate a President who chose to administer the government without the aid of the customary advisors. (2) Since the Cabinet functions of an executive secretary are very important and are of such a personal character, the Senate seldom questions the President's nominations for these places. The attitude of the Senate toward Cabinet appointments is very different from that practiced in other appointments. This is as it should be, but it indicates a special recognition of a principle involved in forming the Cabinet. (3) Party affiliation is a strong factor but this alone will not secure a Cabinet place. (4) Political leadership in the President's party, which may be evidenced by previous political activities on the surface or in the quiet circles of business or public affairs is a necessary adjunct to political orthodoxy. (5) Rotation

in office is almost invariably followed, perhaps to the detriment of the country.<sup>11</sup> (6) Personal friends of the President, other requirements being met, generally have preference. However, bargains made in national conventions to secure the nomination for a certain candidate have at times largely controlled the make-up of the Cabinet. (7) Geographical distribution is always considered. As a rule not more than one man is selected from the same state, and it is generally considered good policy not to select a member from the President's state. Formidable rivals for positions in Congress held by the President's friends may be satisfied by Cabinet appointments. (8) Special fitness for a definite portfolio has its place among the considerations governing the selection of Cabinet members. The Secretary of State is usually selected with the greatest care and sometimes plays a strong part in selecting his colleagues. He enjoys social precedence in the Cabinet and is regarded as its leading member, succeeding to the Presidency next after the Vice-President. The Secretary of the Treasury is the next most important member of the Cabinet and is usually a person of demonstrated business ability.<sup>12</sup>

#### V. THE SOURCES OF CABINET MATERIAL

Since the American Cabinet is not responsible to Congress, the President is free to select its members from the trades, professions, or politics. Congress usually furnishes one or more of its members. Ex-governors, because of their experience in politics and executive matters, have furnished their share of Cabinet officers. The legal profession has possibly been the largest contributor. A legal knowledge is particularly desirable for a Secretary of State or an Attorney General and useful to any of the heads of departments. The diplomatic service is a splendid training school for Cabinet material and has supplied several Secretaries of State. Promotion from the lower ranks in the executive departments, especially the Departments of State and Treasury, has not infrequently resulted in Cabinet appointments. A successful banker, labor leader, farmer, or newspaper man may head a department because of his special fitness or personal friendship with the President or the insistence of his trade that it be represented by one of its own leaders. It is

<sup>11</sup> David F. Houston, *Eight Years with Wilson's Cabinet* (1926), I, 1-148.

<sup>12</sup> See William Henry Smith, *History of the Cabinet of the United States of America* (1925), *passim*. This is primarily an account of the various Secretaries.



a stroke of good policy to select a Secretary of Agriculture or Labor from the ranks of these vocations. Except for promises made by the President's friends to secure support for him in the nominating convention and during the election campaign, promises supposedly made without the President's knowledge, he may resort to the great body of his ardent and patriotic supporters for his advisors. He frequently uses one or more of his closest friends to help him discover desirable Cabinet members and to persuade them to accept Cabinet posts. Since Cabinet members receive only \$15,000 a year as heads of departments and since considerable social demand is made upon them, it is practically impossible to hold a Cabinet place except at private expense. This situation frequently handicaps the President in selecting his Cabinet and denies the nation the benefit of the public services of some of its most able statesmen.<sup>13</sup>

## VI. CABINET MEETINGS AND PROCEDURE

The President presides at Cabinet meetings with the Secretary of State sitting on his right, or in his absence the Vice-President may preside. If the President is at the seat of government, the Cabinet regularly meets twice a week, Tuesday and Friday, at the White House. This practice dates since the Civil War. A Cabinet conference follows the procedure of a board of directors of a corporation. The Secretary of State commands priority over the other secretaries in the discussions. While a few members are likely to dominate the discussions, some being gifted in discussion and sometimes not hampered by any knowledge of the subject, the opinions of all are heard and considered.

The agenda of Cabinet meetings depend upon the President. He may choose to deal with departmental matters through the separate heads of departments or he may treat the Cabinet conference as a clearing house for departmental or interdepartmental matters. The former method is more likely to maintain Cabinet harmony and to expedite business; however, President Taft used the Cabinet as an interconnection of departmental affairs, particularly those of a financial character. Matters of general policy are considered as the more regular subject matter of cabinet conferences. Votes are sometimes taken, but as a rule a consensus is reached by general discussion. Regardless of which method is used, the de-

<sup>13</sup> See *The Intimate Papers of Colonel House* by Charles Seymour (1926), I, 83-113.

cision of the Cabinet is only advisory to the President, who in final analysis is responsible for whatever action is taken.<sup>14</sup>

## VII. RELATION OF THE CABINET TO THE PRESIDENT

1. *Its Right to be Consulted.* Precedent and custom have established this right and public opinion demands that the President at least consult his advisors. Of course, legally the President is free to do as he pleases in this matter and public opinion since it is not always informed as to Presidential policies is not strong enough to enforce its will. Frequently things are done before even the newspapers know what has happened. This was true in the case of Roosevelt's participation in the settlement between Japan and Russia in 1905.

Jackson held no Cabinet meetings during the first two years of his Presidency with the result that a strong Congressional lobby representing his own section of the country requested that he follow the custom of his predecessors. President Lincoln resorted to the Jacksonian practice until a group of United States Senators persuaded him that the nation expected him to advise with his Cabinet. Presidents Hayes and Grant did not always advise with their Cabinets on important matters. The members of Wilson's Cabinet complained of the lack of his coöperation and consultation with them.

These instances, however, are exceptions to the rule and are condemned by public opinion. Party influences, the dignity of the Cabinet office, the dependence of the President on expert advice in so many matters, and public opinion, are strong factors in enforcing the consultative right of the Cabinet. It may be stated that as a rule the President will consult his advisors on important matters of policy and that no action concerning the work of a department would be taken without advising with its head. In fact, if the head of a department were ignored in matters relating to his special duties, he would have sufficient cause to resign and public opinion would support his action.

2. *The Weight of Its Opinion.* The weight of the opinion of the Cabinet depends on the ability of its members, the manner in which their advice is offered, the political situation, and the character of the President. "Historically traced," says Hinsdale, "the line of

<sup>14</sup> See J. H. Finley and J. F. Sanderson, *The American Executive and Executive Methods* (1908), Ch. XVI. See also Benjamin Harrison, *This Country of Ours*, 71, 105, 107, 169.

Cabinet influence is a zig-zag.”<sup>15</sup> The Cabinet was practically the administration during the latter part of Buchanan’s term and Pierce followed the practice of abiding by the opinion of the majority of his advisors. Military Presidents have generally treated the Cabinet members as second lieutenants. McKinley refused to follow the opinion of John Hay as Secretary of State, who was chosen because of his demonstrated ability in the diplomatic service, as to demanding the Philippine Islands of Spain in 1898. Wilson practically ignored the opinion of Secretary of State Bryan in the diplomatic relations with Germany during the Great War and treated very indifferently the advice of Secretary Lansing in regard to matters affecting the Paris Conference of 1919.<sup>16</sup>

There are about three sets of relations that have prevailed between the President and the Cabinet in the course of its development. At times the Cabinet has been the controlling force in the administration, making the Presidency into a sort of regency. At other times a spirit of coöperation as among equals has characterized the relations of the President and Cabinet members. The President was merely first among equals. It was a case of sharing power, prestige, and influence. Possibly the more normal relation is that of almost complete subordination of the Cabinet to the President. Sometimes the ambition of a Cabinet member to become President causes him to subordinate his opinions to the President’s views in order to secure his support for the nomination for the Presidency. Presidents have made Presidents out of their Secretaries. When a strong President is in office, it is not wise for the Cabinet members, if they want to retain their posts, to oppose too vigorously his views. It is best to maneuver until his attitude is discovered and then support it. “We think the real importance of the Cabinet in our system,” said a recent writer, “has been clouded of late. A tradition of loyalty to the President has grown up, which too much tends to degrade the Secretaries into echoes and adulators.”<sup>17</sup> Until the course of events modifies the existing order, the relation of the Cabinet to the President may be stated as follows: “What we call the Cabinet is, therefore, a purely voluntary, extra-legal association of the heads of the executive departments with the President, which may be dispensed with at any moment by the President, and whose resolutions do not legally

<sup>15</sup> McLaughlin and Hart, *Cyclopedia of American Government* (1914), I, 200.

<sup>16</sup> Robert Lansing, *The Peace Negotiations* (1921), 3-13.

<sup>17</sup> *The Nation*, LXXXI, 26.

bind the President in the slightest degree. They form a privy council and not a ministry." <sup>18</sup>

Since the Cabinet as such has no constitutional or legal status, its life is in the hands of the unwritten constitution. Since it is a rather harmless institution, it would seem that its future existence may be granted. It is sometimes a worry to the President and the nation, but like other appendages it will likely continue to be tolerated and may in due season become the chief agency of the Presidency.

#### VIII. THE RELATION OF THE CABINET TO CONGRESS

While the Cabinet as a collegial institution and its members as heads of departments are directly responsible to the President, this responsibility has never been acknowledged as complete by Congress. Congress can decide and control what shall be done, leaving only to the President the discretionary or political authority to decide how it shall be done. Congress determines in final analysis the financial basis of the operation of the government, and may by this means control the activities of the administrative branch of the government.

The executive departments, whose heads constitute the Cabinet, are the creatures of Congress and could be abolished or modified by it as it saw fit. It may increase or decrease their powers and prescribe the procedure for their exercise. The heads of departments make detailed annual reports to Congress in accordance with statutory provisions and are frequently requested by one or both houses for additional information. Sometimes the request takes the form of demands. This request need not be, and is not always, heeded, but as a matter of fact Congress secures a large amount of information by this method, resulting in publicity with salutary effects at times.

Formal investigation by either house or both is always a possibility and in recent years has come to be a very effective means of control. A committee of either house with power to summon witnesses, take testimony, and collect documents as the means of securing necessary information has come to be a most effective check on executive policies. While heads of departments cannot be compelled to appear for inquisition, as a matter of practice they generally do. <sup>19</sup>

<sup>18</sup> J. W. Burgess, *Political Science and Comparative Constitutional Law*, II, 263.

<sup>19</sup> Ernest J. Eberling, *Congressional Investigations* (1928), 228-340.



Impeachment may be used as a final resort, though this method of control is generally regarded as ineffective. James Bryce very fittingly described it as the "heaviest piece of artillery in the Congressional arsenal, but because it is so heavy it is unfit for ordinary use. It is like a hundred-ton gun which needs complex machinery to bring it into position, an enormous charge of powder to fire it, and a large mark to aim at."<sup>20</sup>

In the matter of legislation the members of the Cabinet are very closely associated with the legislative committees of Congress. They frequently act as the agents of the President in appearing before committees and inducing his or their friends to introduce measures, which in many instances they draft themselves. Since a large amount of legislation concerns departments, the committees frequently call the Secretaries before them for information. The Secretaries not infrequently occupy seats in the halls of Congress when measures affecting their departments are under consideration, though their presence in this sacred conclave sometimes evokes a philippic from some member of the opposition party.

#### IX. THE FUTURE OF THE CABINET

There is no valid reason why Americans should not be as intensely practical in political affairs as they are in business matters. A recent foreign critic has charged, not without some foundation, that we are not giving the attention to our political institutions that our forefathers did.<sup>21</sup> Since the Cabinet as an institution has come about and is likely to remain with us, it would seem wise and proper to utilize it to the best advantage, if such can be done without radical change or violation of the spirit of our institutions. It has long been a matter of agitation not merely in academic circles, but also in the ranks of practical statesmen, that the present indirect and unsatisfactory relations between the President and Congress should be converted into a direct and open relationship by granting the Cabinet members seats in Congress with the right to participate in its deliberations. A Senate Committee in 1881 reported in favor of this change<sup>22</sup> and Senators and Representatives at various times have indicated their approval of it.

"Perhaps the most striking aspect of the plan to have Cabinet

<sup>20</sup> *The American Commonwealth* (New and Rev. Ed., 1923), I, 212.

<sup>21</sup> André Siegfried, *America Comes of Age* (tr. by H. H. and Doris Hemming, 1927), 239-334.

<sup>22</sup> *Congressional Record*, February 4, 1881.

officers speak on the floor of Congress is the simplicity with which it could be adopted and the equal ease with which it could be dropped upon trial if it proved unsatisfactory.”<sup>23</sup> There is nothing but custom to prevent either the President or a member of the Cabinet from speaking on the floor of Congress. The rules of both houses already give a Cabinet member the right to be on the floor of Congress during sessions and if he should ask permission of the presiding officer of either house to speak, he would be violating no constitutional provision, law, or rule of procedure. Of course, no Cabinet member would undertake to institute such an innovation. A resolution of Congress, or a rule of each house would suffice to effect the change. This privilege, if and when granted, should include the right to make motions and introduce bills, but, of course, not to vote.

This change would make the Presidency a responsible institution and furnish a contact equally advantageous to both administration and legislation. “It would enable Congress,” says Rowell, “to become what the legislative assembly of every other free people already is—the center of gravity of government and the focus of popular attention. It would not create a new executive leadership. That exists already. It would remove its only menace, by making it *visible* and *responsible*. Much more important would be the new legislative leadership which it would activate out of the ranks of Congress itself.”<sup>24</sup>

Since Congress has under the budget system accepted executive leadership in financial legislation, by far the most important class of legislation, it has not only committed itself to the principle involved in this change but has also made the adoption of the reform in its entirety much more necessary as a means of properly handling budgetary matters. The Presidency of the United States is too powerful an institution not to be under more effective supervision of Congress and Congress is too helpless in legislation not to use the assistance of the Executive. Their problem—to give the American people the best government of which they are capable—is a difficult and mutual one and should be solved by coöperation.<sup>25</sup>

<sup>23</sup> *40 World's Work*, 553.

<sup>24</sup> *Ibid.*, 554.

<sup>25</sup> See *The Public Papers of Woodrow Wilson* (Ed. by Baker and Dodd), I, 95-129, 336-359, and William MacDonald, *A New Constitution For A New America* (1921), 25-32, 47-52, 61-68.

## CHAPTER XV

### THE EXECUTIVE DEPARTMENTS

#### I. THE NATURE AND SCOPE OF ADMINISTRATION

"The term 'administration'," says Willoughby, "may be employed in political science in two senses. In its broadest sense, it denotes the work involved in the actual conduct of governmental affairs, regardless of the particular branch of government concerned. It is thus quite proper to speak of the administration of the legislative branch of government, the administration of justice or judicial affairs, or the administration of the executive power, as well as the administration of the affairs of the administrative branch of government, or the conduct of the affairs of the government generally. In its narrowest sense, it denotes the operations of the administrative branch only."<sup>1</sup> It is in the latter sense that the term is used in this discussion, including the President and his subordinates in the performance of their administrative functions.

The relative importance of the administrative and legislative functions of government in a great society has been impressively stated as follows: "The making of laws is a relatively simple matter; it is easy for the legislature to appropriate money and declare that the government shall regulate the rates and services of railways or build and maintain a huge canal or water-works system. The legislature can proclaim its will in general terms and adjourn. The work of the executive department, on the other hand, carrying its will into effect continues night and day. It involves the expenditure of great sums of money, the employment of hundreds or even thousands of people, the purchase and management of supplies and complicated equipment, and perhaps the property and interests of millions of citizens. The legislature may embrace fifty or a hundred or five hundred members at most: the administration employs tens of thousands, hundreds of thousands. As the work of administration runs to the roots of modern society, touching every phase of social and economic life, so the manner in

<sup>1</sup> W. F. Willoughby, *Principles of Public Administration* (1927), I.

which it is conducted really determines the destiny of the state. If it is conducted wisely and efficiently it may render incalculable services to the people; if it is managed justly it will command the affections of those whom it serves, building the foundations of social order on the respect and esteem of all classes. If it is inefficient and unjust, it may cast discredit upon the established order and lead to its disintegration and decay.”<sup>2</sup>

The chief reasons for the constantly increasing importance of the administrative side of government briefly stated are: (1) the complexity of modern society has forced legislatures to be content with the enactment of general laws, delegating to administrative agents the rule-making power with the effect of law to cover the details of legislation; (2) the great increase in the scope of governmental activities through its intervention in the social and economic life of the people has increased the volume of legislation to be administered; (3) the development in recent years of a science of administration largely under private initiative has led to an insistent demand for a more scientific management of public affairs; (4) the increased cost of government has made necessary greater economy and efficiency in its administration; (5) the gradual extension of the merit system in national, state, and municipal service has given a dignity and professional character to public administration in this country which has heretofore been its greatest defect; (6) the nature of public administration has become so technical in character that the employment of specially trained civil servants has been forced upon all governments even as a matter of good politics.<sup>3</sup>

## II. THE ESTABLISHMENT OF THE EXECUTIVE DEPARTMENTS

It has previously been noted that executive departments became a feature of the government under the Articles of Confederation. It is necessary that the chief executive of any government have subordinates to aid him in the performance and supervision of the executive function. The Convention of 1787, therefore, merely assumed that there would be executive departments, and wisely did not attempt their establishment. The nature of society and the scope of the functions of a government determine what executive departments it should have. It was, therefore, fitting and necessary that this matter be left to the decision of Congress to be determined

<sup>2</sup> Charles A. Beard, *American Government and Politics* (1928), 38.

<sup>3</sup> See Leonard D. White, *Public Administration* (1926), 1-21.



in accordance with the future needs of society and the operation of the government.

There was no constitutional basis for the establishment of executive departments under the Articles of Confederation, but Congress was forced to create four such departments, two of which continued to function to 1790. It was upon this development that the Convention of 1787 was warranted in assuming that there would be executive departments under the new order. Hence the Constitution mentions executive departments only incidentally. It provides that the President "may require the opinion in writing of the principal officer in each of the executive departments,"<sup>4</sup> and in connection with the power of appointment, it says that Congress may invest the appointment of inferior officers "in the heads of departments."<sup>5</sup> It is upon this rather meager constitutional basis that the present executive departments which administer both the domestic and foreign affairs of the United States have been established. There is plainly no mandate in the Constitution for their establishment and only a slight implied authority; they are really a part of the unwritten constitutional order, and might be abolished without doing violence to the charter of 1787.

There are now ten executive departments which Congress has established as the work of the government has expanded and needs of society increased. These are State, War, and Treasury, 1789; Navy, 1798; Interior, 1849; Justice, 1870; Post Office, 1872; Agriculture, 1889; Commerce, 1903; and Labor, 1913.<sup>6</sup> The heads of these departments are appointed by the President with the approval of the Senate and are called Secretaries except in the cases of the departments of Post Office and Justice which are directed by the Postmaster General and an Attorney General, respectively.<sup>7</sup>

### III. GENERAL SCHEME OF ADMINISTRATIVE ORGANIZATION

The national government has an integrated system of administration. At its head is the President with complete responsibility for its work in all of its ramifications. For convenience and effi-

<sup>4</sup> *The Constitution*, Art. II, Sec. 2, Cl. 1.

<sup>5</sup> *Ibid.*, Cl. 2.

<sup>6</sup> John Philip Hill, *The Federal Executive* (1916), 12-26.

<sup>7</sup> The Postmaster General did not become a member of the Cabinet until 1829; the office of Attorney General has existed since 1789, but did not become the Department of Justice until 1870; and while the Department of Agriculture was created in 1862, its Secretary was admitted to the Cabinet in 1889.

ciency this work is organized into single-headed departments which in turn are divided into bureaus which are themselves composed of smaller units called divisions. While this principle of hierarchical subdivision of department is followed in the main, sometimes the major divisions of departments are called offices, commissions, or even divisions. The difference between the two is not a matter of principle but an inconsistency of terminology, unfortunate, however, in some respects in that it tends toward confusion. The principle on which the work of the administration is divided into departments with subdivisions is that each unit whether department, bureau, or division shall represent a *unified* subject matter as nearly as practicable so as to prevent its head from being charged with a diversity of functions.<sup>8</sup> The purpose is to secure efficient supervision over each service on the theory that no one is likely to be expert in more than one field. There are in general two classes of officials in these departments: (1) the heads of the various units who direct their work and (2) their subordinates who actually perform the service. They might be called the *administrators* and the *workers*. The head of each department is assisted by one or more subordinates usually called assistant secretaries who have the oversight of one or more major divisions of a department. In the departments of State, Treasury, Justice, Interior, Agriculture, Commerce, and Labor, there is an Under Secretary, or an Assistant to the Secretary, who ranks next to the Secretary and above the Assistant Secretaries. He is for practical purposes the chief administrative official of the department and acts in lieu of the Secretary in case of his absence. The institution of Under Secretaries is a newer tendency in departmental organization in the United States and apparently adds unity, permanence, and efficiency to the departments. The bureaus are under the direction of commissioners except in such departments as war and navy where directors, comptrollers, and military and naval officials perform the functions of commissioners. The less important bureaus and divisions are in charge of bureau or division chiefs. "The bureau chiefs," says MacMahon, "are the key figures in national administration. The units that they direct are inclusive enough to lend themselves to the purposes of supervision and coördination and to bring their heads in touch with the machinery of budget-making and legislation, and sufficiently focused to preserve for them a saving contact with details and technique. The importance

<sup>8</sup> It is later shown under the heading of the reorganization of the executive departments that this principle has only theoretically been observed.

of their positions can hardly be exaggerated." <sup>9</sup> The head of each department and the bureau or division chiefs are assisted in their administrative routine by a hierarchy of clerks, consisting of a chief clerk for the department and each of its subdivisions, whose business is to supervise the work of its employees. The chief clerk has the general direction of the clerks and employees of the various units of the department; reads and distributes its mail; directs its publications; and acts as custodian of its property. The chief clerk of each departmental division makes a monthly report of its work to the chief clerk of the department who makes a similar report to the head of the department.

Of course, the departments at Washington and the most of their subdivisions have an army of subordinates scattered throughout the country, who are appointed by the President and Senate, the President alone, or the heads of departments, and who are under the direct supervision of officials at Washington. This supervision is exercised by administrative regulations with the effect of law, by appeals to superior officials, and by government inspectors or agents who visit the districts of these subordinates and report upon their work. As a result of these methods of appointment, the absolute power of dismissal, and rigid inspection, the administration of the United States in so far as it relates to the executive departments is highly centralized.

There are, however, certain decentralized features of national administration which sharply differentiate it from the French or the English system. In the first place, the departmental scheme of organization does not prevail throughout the system. There is an increasing number of independent boards and commissions which have charge of important phases of national administration and which are in no way subject to the supervision of any department. In the second place, the field agents of each department work independently of each other. Furthermore, there are no district agents of the national government comparable to the French prefects with general powers of supervision over the state agents of local government. There is practically no legal relation between the national and state agents of administration although there is a growing extra-legal relation. In fact one of the most significant tendencies in our new federalism is the growing interdependence of national and state administration, resulting in a network of extra-constitutional relations between national and state authorities.

<sup>9</sup> Arthur W. MacMahon, 20 *Am. Pol. Sci. Rev.*, 548.

## IV. THE THREEFOLD RELATION OF HEADS OF DEPARTMENTS

1. *The President's Agents.* The Supreme Court has from time to time defined the relation of the head of a department to the President. In discussing an act of the Secretary of War, Justice Barbour said: "The President speaks and acts through heads of the several departments in relation to subjects which appertain to their respective duties."<sup>10</sup> In their relation to the President, it follows that they are agents of the executive power as defined in the Constitution and that their acts are his acts. They may exercise discretion in political matters without their acts being subject to judicial notice.<sup>11</sup> In general a decision of the head of a department against a public creditor or in a matter involving judgment and discretion binds his successor.<sup>12</sup> He may, however, review the decisions of his predecessor in matters of fact for errors or in case of rejected claims in which material testimony is later discovered and presented.<sup>13</sup> It would be an act of doubtful propriety for the President to review the decisions of heads of departments in these matters. The head of a department has the right to alter a departmental practice of a predecessor.

2. *Agents of the Law.* Many of the duties of heads of departments are prescribed by law on the performance of which the rights of individuals depend. In this capacity, they are officers of the law and are amenable to it for their conduct. These duties are of a ministerial character, and are, therefore, not subject to the direction of the President. They are also given power by the law to prescribe regulations for their departments concerning the conduct of their officers and performance of their work, and as long as such regulations are promulgated in harmony with the law, they have the effect of law.

3. *Relation to Congress.* The departments are created by Congress and their functions are prescribed by its acts. They may be abolished, reorganized, or limited in their scope of activities as it sees fit. This relation is contemplated by the Constitution. Either house may call on the heads of departments for information or

<sup>10</sup> *Wilcox v. Jackson* (1839), 13 Peters 513. This principle is sustained in *Kendall v. United States* (1838), 12 Peters 524; *Runkle v. United States* (1887), 122 U. S. 543; *Hegler v. Faulkner* (1894), 153 U. S. 117. See also Cooley's *Blackstone's Commentaries*, Bk. I, 231-36.

<sup>11</sup> *United States v. Blaine* (1891), 139 U. S. 306; *United States v. Guthrie* (1854), 17 Howard 284.

<sup>12</sup> *Op. Attys. Gen.*, 300.

<sup>13</sup> *United States v. Bank of Metropolis* (1841), 15 Peters 377.



explanation in matters relating to their official duties. By this power of inquisition and investigation their acts of maladministration may be exposed and condemned by either house so effectively as practically to force their resignation. In this respect there is a growing tendency toward the development of a responsible ministry. Moreover, this power of interpellation and censorship is supplemented by the process of impeachment, by which, if it is sustained by the Senate, the heads of departments may be removed from office and disqualified for holding any office in the national government in the future.<sup>14</sup>

## V. NATURE OF THE WORK OF THE DEPARTMENTS

The activities of the Department of State relate to both domestic and foreign affairs. It is, therefore, both a home and foreign office. As a home office, its more important duties are the custody of the great seal of the United States, the publication of the federal statutes and executive proclamations, the promulgation of amendments to the Constitution, the preservation of the originals of all laws, treaties, and foreign correspondence, the certification of the results of national elections to the House and Senate, and the conduct of the official communications between the President and the governors of the states.<sup>15</sup>

It is, of course, in the field of foreign affairs that the major functions of the department are found. The Secretary of State is the American minister of foreign affairs, but in this work he is closely associated with the President, who, because of the delicate character and far reaching significance of international relations, especially concerns himself about these matters. The Secretary is the agent of the President in negotiating treaties, sending and receiving diplomatic correspondence, instructing American diplomatic representatives abroad, signing extradition papers for fugitives from justice, and issuing passports to American citizens. He is controlled more by the President than the other secretaries.

The Diplomatic and Consular Bureaus are the chief agents of the department in the conduct of the foreign service of the nation. The representatives of the United States in the foreign service fall into two general groups: diplomatic and consular. Our diplomatic agents are according to ceremonial rank divided into four classes:

<sup>14</sup> See Hill, *op. cit.*, 52-64.

<sup>15</sup> John A. Fairlie, *The National Administration of the United States of America* (1920), 77-91.

(1) ambassadors, (2) envoys and special commissioners, (3) ministers resident, and (4) *chargés d'affaires*. All grades of diplomatic officials are appointed by the President by and with the advice and consent of the Senate. The United States maintains fifty-one diplomatic missions at as many capitals of the world under the direction of twelve ambassadors and thirty-nine ministers.

The ambassador is the highest rank of diplomatic representative and has charge of an embassy, while a minister has under his direction a legation; however, in duties and authority there is very little difference. Associated with our ambassadors and ministers are 125 diplomatic secretaries and more than 400 other subordinates of different ranks. It is the business of the diplomatic representative to conduct the correspondence between his home government and the government to which he is accredited, to see that their treaties are not violated, to notify his home government of matters which concern its interests, and in general to furnish it with such information as will enable it to formulate an intelligent foreign policy. Our diplomats are essentially the political observers of the President in the field of world politics.<sup>16</sup>

The consular representatives are divided into five groups: (1) Consuls-general—traveling inspectors of the consular service throughout the world; (2) Consuls-general—supervisors of the consular service of particular countries; (3) Consuls at innumerable commercial centers throughout the world; (4) Vice-consuls; and (5) Consular Agents. The two latter groups are the subordinate agents of consuls, in their districts. All grades of consular officials are appointed by the President by and with the advice and consent of the Senate. The United States has more than 500 consuls with more than 2,000 vice-consuls, consular agents, clerks, interpreters, and subordinates engaged in the consular service throughout the world.

The American consuls are the commercial agents of the business interests of the nation. They make more than 2,000 reports a month on trade conditions in foreign countries, and reply to 5,000 inquiries per month from American business men. They handle the estates of Americans who die abroad, collect the taxes from Americans living in foreign countries, look after their births, deaths, and marriages, act as the paymasters of the government to Americans abroad who are receiving pensions or salaries from the government and render a wide range of services necessary

<sup>16</sup> See Tracy Lay, *The Foreign Service of the United States* (1925), 100-122.

to the welfare and happiness of their fellow countrymen scattered throughout the world.<sup>17</sup>

✓ The Rogers' Act of 1924 reorganized the foreign service of the United States by combining the diplomatic and consular services, providing for promotion on a basis of merit and for transfer from one to the other, increasing salaries, arranging for training, placing all of its agents below the rank of ambassadors and ministers in the classified service, arranging for appointments only after examination and probation, providing for leave of absences and a retirement and disability fund, and pledging the nation to the policy of providing suitable buildings for this service in foreign countries. In 1926 ten millions of dollars were appropriated for the latter purpose.

This legislation constitutes only the first step toward making a profession of our foreign service and placing it on a parity with service in the army and navy. It constitutes our first line of defense and upon its efficiency largely depends the usefulness of military force. It would appear that the nation is beginning to learn that brains are more economical and efficient than armies and navies. Salaries are yet inadequate, standards too low, housing quarters too poor, and the recognition of training and expert service too uncertain to induce the best talent of the country to enter its foreign service. Progress, however, is being made along all these lines.<sup>18</sup>

The Department of Treasury is in some respects the most important of the executive departments. Since it pays the bills of the government it comes in contact with all of its activities and, therefore, has a limited supervision over them. Its administration of the finances of the government makes it peculiarly the agent of Congress. Either branch of Congress may ask the Secretary of the Treasury for a report or information to be given in person, without addressing the request to the President.

The Secretary is assisted by an Under-secretary and three Assistant Secretaries. The Under-secretary may act for the Secretary in any branch of the department and in administration has direct supervision of all of the fiscal affairs of the government. Each assistant secretary is charged with the direction of a group of bureaus, services, offices, and divisions, frequently unrelated in the nature of their work. In fact, this department is a polyglot of services resembling much more a mutual mistrust society than

<sup>17</sup> *Ibid.*, 124-150.

<sup>18</sup> *Ibid.*, 253-283.

an integrated unit of administration. The scientific administration of its affairs would require radical reorganization.

Its chief function is the collection of the national taxes. This is done through the Bureau of Internal Revenue and the Bureau of Customs. The Bureau of Internal Revenue is in charge of a commissioner, who is appointed by the President and Senate, and who has under his direction an army of subordinates at Washington and throughout the country. He is by law the administrative head of the internal revenue service and under the direction of the Secretary has general supervision over the assessment and collection of all internal duties and taxes. Under the commissioner are the heads of the various divisions of the bureau, one of whom is the head of the field force of revenue agents and inspectors who examine the books of the taxpayers to see if they have made the proper return on their incomes.<sup>19</sup> The United States is divided into sixty-four internal revenue districts, each of which is under the control of a collector with a large force of assistants. The taxes collected by this bureau are levied on incomes, estates, telephones, telegraphs, beverages, tobacco, automobiles, pianos, candy, firearms, sculpture, paintings, carpets, yachts, perfumes, capital stock, occupations, and stamps.

The Bureau of Customs is under the immediate supervision of the Commissioner of Customs. He is assisted at Washington by a host of subordinate directors, attorneys, examiners, clerks, engineers, accountants, and stenographers together with a large field organization in charge of the ports of entry.<sup>20</sup> The services of the division fall into three categories: fiscal, regulatory, and statistical. The nation is organized into 47 customs districts containing about 300 ports of entry with a collector in charge of each district assisted by subordinate administrators and experts for the different kinds of service. There are comptrollers of customs stationed at the leading port cities of the nation who examine the work of the collectors' offices and report their findings to the Secretary of the Treasury. The customs service collects import duties which are of three kinds; (1) specific; *i.e.*, a definite duty on a unit of quantity, *e.g.*, 20 cents per pound; (2) ad valorem; *i.e.*, a duty on the value, *e.g.*, 20% of the value; (3) compound, *i.e.*, a duty on both quantity and value; *e.g.*, 3 cents per pound plus 10% of the value.

<sup>19</sup> L. F. Schmeckebier and F. X. A. Eble, *The Bureau of Internal Revenue* (1923), 124-175.

<sup>20</sup> L. F. Schmeckebier, *The Customs Service* (1924), 79-124.



In addition to the collection of revenue, the Department of Treasury supervises the management of national banks, the administration of the public debt, the issuance of paper money,<sup>21</sup> and the coinage of gold and silver, supervises and controls the farm credit system,<sup>22</sup> acts as custodian of public moneys, and audits all the accounts of the government. In the collection of the revenue of the nation and the supervision of its expenditure, the Department of Treasury is the financial agent of the government; but unfortunately it is charged with the performance of other functions of a purely non-fiscal character such as the promotion of public health,<sup>23</sup> the construction of public buildings,<sup>24</sup> the direction of the coast guard service, and the enforcement of prohibition. The budget bureau is nominally in this department, but is actually under the direct control of the President.

The Departments of War and Navy are the agents of the government for national defense. Each is directed by a Secretary, who is always a civilian. The strength of the military and naval forces is a matter of policy which is determined by Congress on the basis of recommendations by the departments and the needs of the nation, but the administration of the departments is under the direct supervision of the President, who by the Constitution is commander-in-chief of the army and the navy as well in peace as in war. It is for him, therefore, to say what disposition shall be made of the armed forces of the nation at all times; but he exercises this authority through the Secretary of War and the Secretary of the Navy, whose business it is to see that their forces are well trained and equipped to the extent that provisions by Congress will permit.

The duties of the Secretaries are fixed by the laws of Congress and the orders of the President. Each is assisted by two Assistant Secretaries, who are civilians, and by the bureau heads, who are regular officers in the army and navy. The Assistant Secretaries are chiefly personnel officers and supervise enlistments, the granting of discharges, clemency, honors, and army and navy aeronautics. They are appointed by the President and Senate. The actual direction of the army, including the supplies of food, clothing, and munitions is in charge of a General Staff, the Chief of which is semi-independent of the Secretary and enjoys the right

<sup>21</sup> John Gilbert Heinberg, *The Office of the Comptroller of the Currency* (1926), 20-32.

<sup>22</sup> W. Stull Holt, *The Federal Farm Loan Bureau* (1924), 62-74.

<sup>23</sup> L. F. Schmeckebier, *The Public Health Service* (1923), 147-161.

<sup>24</sup> Daniel Hevenor Smith, *The Office of the Supervising Architect of the Treasury* (1923), 46-68.

of direct communication with the President. It is his business in conjunction with the General Staff to prepare the program of the army under the direction of the Secretary and to see to its efficient execution. The activities of the Department of War are not restricted to military duties; it is improperly charged with the performance of such civilian functions as the protection of the navigable waters of the United States, river and harbor improvements,<sup>25</sup> and the supervision of the governments of the Philippine Islands and Porto Rico through the Bureau of Insular Affairs.

The Secretary of the Navy is advised in technical matters by a General Board created by departmental regulations, the chief of which is the head of the Bureau of Navigation. This relation, although somewhat similar to that prevailing between the Secretary of War and the General Staff, is purely advisory. As a matter of fact, the Secretary of the Navy has a much greater personal control over its administration than the Secretary of War has over the army. The chief bureaus of the department are in charge of naval officers and their names largely indicate the character of their work: yards and docks, construction and repair, supplies and accounts, medicine and surgery, navigation, ordnance, aeronautics, and engineering.

One of the most picturesque arms of the navy is the Marine Corps, a specially organized and trained body of men to supply the navy with a land force skilled in naval warfare. They are both soldiers and sailors in times of war, and are therefore peculiarly fitted to help the navy secure and defend a land base for its operation. They are used also as a sort of international police force and may be sent wherever disorders threaten American lives or property.

The Department of Navy is also charged with the control of the islands of Tutuila, Guam, and the Virgin Islands, which are used primarily as naval bases. The Naval Academy at Annapolis and the Naval War College at Newport, R. I., are also under its direction.

The Department of Post-Office is a huge service agency. It more nearly resembles a great business enterprise than a department of government. It is supposed to pay its own operating expenses from its receipts, which are kept in the Treasury of the United States in a separate fund subject directly to the disposal of the Postmaster-General, together with such appropriations as

<sup>25</sup> W. Stull Holt, *The Office of the Chief of Engineers of the Army* (1923).

Congress makes to care for deficits. The department has 330,000 employees, handles more than \$3,000,000,000 yearly and more than 36,000,000 letters daily in addition to the other classes of mail, and pays about \$500,000,000 a year to its employees and the railroads, and for its supplies and equipment. Its service, therefore, assumes the character of a mammoth business whose ramifications touch the life of every American citizen almost daily.

The duties of the Postmaster-General and the four Assistant Postmasters-General are very similar to those of a president and vice-president of a great railway system. The Postmaster-General is the executive head of the department and appoints all its Washington officers and employees, except the four Assistant Postmasters-General, the Purchasing Agent, and the Comptroller, who are presidential appointees, and with the exception of the postmasters of the first, second, and third classes, who are also presidential appointees, he appoints all the postmasters, officers, and employees in its service throughout the nation. Subject to the approval of the President, he makes postal agreements with foreign governments, directs the Foreign Mail Service and the Postal Savings Banks, and awards and executes the contracts of the department.

The work of the department is divided into four major groups of activities with an Assistant Postmaster-General in charge of each. Each group is subdivided into divisions, each of which is under the immediate direction of a superintendent. The First Assistant has control of the divisions of Post-Office Service, postmasters' appointments, post-office quarters, motor vehicle service, dead letters and dead parcel post. The Second Assistant directs the divisions of railway adjustments, foreign mails, railway mail service, and air mail service. The Third Assistant supervises the divisions of finance, money orders, classification of mail, stamps, registered mail, and postal savings. The Fourth Assistant is charged with the supervision of the divisions of rural mail, equipment and supplies, mail equipment shops, and topography or mail routes.

The railway mail service is the largest division of the postal service. It employs more than 20,000 clerks, who receive more than \$40,000,000 a year. The railroads are paid \$80,000,000 a year for carrying the mail. The Sea Post Service handles the trans-oceanic mail while the Rural Free Delivery reaches the home of practically every farmer in the nation. The money order service sells both domestic and foreign money orders by means of which

money can be transmitted to almost any point within the confines of civilization.

Recent expansion in the service of this department led to the establishment of Postal Savings Banks in 1910, Parcel Post in 1912, and the Air Mail Service in 1918. The Postal Savings Banks have more than 500,000 accounts and \$150,000,000 deposits. Packages weighing as much as fifty pounds are transported by the Parcel Post. The Air Mail Service is being rapidly extended to meet the social and commercial needs of the nation for a more expeditious method of mail transportation.

In addition to the above major divisions of the work of this department, there are the legal advisors, who under the direction of the Solicitor give opinions to the Postmaster-General and the heads of the subdivisions of the department on questions of law arising from the administration of the postal laws and regulations; the Purchasing Agent, who supervises the purchase of all supplies used in the postal service; and the Chief Inspector who with fifteen divisional inspectors sees that the work of the department is honestly, efficiently, and promptly done.<sup>26</sup>

The Department of Justice is under the direction of the Attorney-General who is, therefore, the chief law-officer of the government. It is consequently his duty to supervise the work of the district attorneys and marshals in the district courts of the United States, to see that the government is represented by able legal talent in its litigation, and upon request by the President and heads of departments to give his advice and opinion on questions of law touching their administrative duties. This department like the Department of Treasury is intimately related to all the administrative agents of the government, and, notwithstanding the fact that several departments have their own legal advisors for minor matters,<sup>27</sup> only the decisions of this department are binding upon the heads of the executive departments.

While the Attorney-General himself appears before the Supreme Court in cases of exceptional gravity and importance, for the most part this work is done by the Solicitor General who is

<sup>26</sup> See Hill, *op. cit.*, 134-142; Fairlie, *op. cit.*, 135-151; Milton Lloyd Short, *The Development of National Administrative Organization in the United States* (1923), 267-298.

<sup>27</sup> The solicitors for the departments of State, Treasury, Commerce, Labor, and the Bureau of Internal Revenue are members of the Department of Justice for pay roll purposes, but actually exercise their duties under the direction of their respective department heads. The assistant solicitors of these departments are not on the pay roll of the Department of Justice.



also empowered by law to exercise the duties of the Attorney-General in case of his absence or disability or vacancy in the office. The Assistant to the Attorney-General has special charge of prosecutions for the violation of the federal anti-trust laws.

In addition to these immediate assistants of the Attorney-General in the performance of the duties with which he is personally charged, there are seven Assistant Attorneys-General who are responsible for special phases of law enforcement and who also under the direction of the Attorney-General prepare legal opinions and under assignment of the Solicitor General appear before the Supreme Court. The divisions of their work are: (1) claims against the United States; (2) admiralty and finance; (3) criminal matters; (4) public land matters; (5) prohibition, taxation, and commerce; (6) matters relating to appointments; and (7) customs matters. The Assistant Attorney-General in charge of appointments is also responsible for the administrative routine of the department in which matter he is assisted by a chief clerk, appointment clerk, disbursing clerk, and a general agent. The attorney in charge of pardons is also under his direction as well as the Bureau of Investigation which collects evidence and information to aid the presentation of any suit in which the government is interested. This bureau is the eyes of the government in the detection of crime. It contains a specialized library of criminology in which are found the criminal record, the photograph, and fingerprints of every known criminal. The Assistant Attorney-General responsible for the enforcement of the laws of prohibition, taxation, and commerce also supervises the administration of the federal prisons with the assistance of the Superintendent of Prisons.

The work of the department at times requires the employment of special attorneys to handle specific cases and Congress furnishes the Attorney-General with an appropriation for this purpose. Such attorneys are given the title of special assistants and when the cases in which they are employed are terminated their services cease unless they are assigned to new cases. This elasticity in the administration of the department enables it to expand its legal force to care for the enforcement of the laws of the government in such a manner as to secure the respect of its law-abiding citizens and the fear of the criminal. The functions of this department are intended to insure domestic tranquillity.<sup>28</sup>

The Department of Interior established in 1849 is generally

<sup>28</sup> See Short, *op. cit.*, 330-343.

regarded as a home department and is under the direction of the Secretary of Interior, who in addition to the general supervision of the work of the department is the chief administrator of the government railroad in Alaska,<sup>29</sup> and is an *ex-officio* member of several commissions of the government.<sup>30</sup> The two major divisions of the activities of the department are in charge of the First Assistant Secretary and the Assistant Secretary, while the administrative routine of the department is in the hands of a chief clerk who supervises the departmental estimates, disburses its funds, distributes its mail, looks after supplies, directs the work of the subordinate clerks and employees, and in general enforces the regulations of the department.

Under the supervision of the First Assistant Secretary are the General Land Office<sup>31</sup> and the Bureaus of Reclamation<sup>32</sup> and Mines,<sup>33</sup> each of which is headed by a commissioner or a director. Since the establishment of the public domain in 1787 the government has come into the possession of 1,835,000,000 acres of land, all of which with the exception of 182,000,000 acres has either been distributed or reserved. This land cost the government about five cents an acre and its distribution largely to actual home builders at a very low cost is undoubtedly the greatest social service ever rendered by a government. The Bureau of Reclamation by irrigation and drainage has added millions of acres to the tillable area of the nation on which are now living more than three million Americans. Through the miraculous transformation wrought by this bureau large desert areas have been converted into the seats of homes, farms, and cities. The Bureau of Mines protects the mining industry of the nation in which more than two million wage earners are engaged. It stations mine-rescue cars in mining regions that perform similar services to fire engines in cities; it seeks by research to eliminate waste from mining, conserves the health of miners by gas masks, artificial breathing apparatus, and prevention of explosions, cave-ins, and fires, and enforces the leasing laws which govern the production of oil, gas, coal, potash, phosphate, and sodium from 980,000,000 acres of

<sup>29</sup> Joshua Bernhardt, *The Alaskan Engineering Commission* (1922), 45-58.

<sup>30</sup> He is a member of the Federal Power Commission, the National Forest Reservation Commission, and the Highway Commission of the District of Columbia.

<sup>31</sup> Milton Conover, *The General Land Office* (1923), 98-124.

<sup>32</sup> *The United States Reclamation Service* (1919. Monograph No. 3. Institute for Government Research Series), 70-97.

<sup>33</sup> Fred Wilbur Powell, *The Bureau of Mines* (1922), 37-69.

the public domain. This bureau has been very appropriately called "Uncle Sam's janitor, garage man, and general utility helper."<sup>34</sup>

Under the Assistant Secretary is a group of institutions, bureaus, and services, which are not particularly related to one another or the other divisions of the department. The Bureau of Indian Affairs<sup>35</sup> looks after the lands, schools, moneys, and health of 225,000 Indians with a view of making them economically and politically responsible citizens. Their wealth aggregates more than a billion dollars. The government maintains 78 hospitals for their welfare, furnishes 150 physicians for their treatment, and teaches 20,000 Indians in its schools. The Bureau of Pensions<sup>36</sup> has 600,000 pensioners on its pay rolls. The Bureau of Education<sup>37</sup> promotes research on special phases of education and in general coöperates with the state educational systems with a view to improving the educational advantages of the nation. The National Park Service<sup>38</sup> is charged with the management of the national parks and twenty-seven reservations. The Geological Survey<sup>39</sup> classifies the public lands and examines their geologic structure and mineral resources and products. Under the direction of this department are St. Elizabeth's Hospital for the Insane, Howard University of Washington, one of the largest negro institutions in the world, Columbia Institute for the Deaf, and the Freedmen's Hospital. It also has supervision of the government of the territories of Hawaii and Alaska, an anomaly from the point of view of a scientific administration of colonial affairs.

The Department of Agriculture has developed from a small agency established in the Patent Office in 1839 when \$1,000 was appropriated for the gathering of agricultural statistics. In 1862 a commissioner of agriculture was created, but it was not until 1889 that agriculture was made an executive department with a secretary on a parity with the other executive secretaries.

While the control of the affairs of the department and the formulation of its policies are under the general supervision of the Secretary, they are more immediately under the direction of the Assistant Secretary, who acts for the Secretary in his absence. The administrative routine of the department is in charge of the

<sup>34</sup> Frederick J. Haskin, *The American Government* (1911), 186.

<sup>35</sup> L. F. Schmeckebier, *The Office of Indian Affairs* (1927), 143-269.

<sup>36</sup> Gustavus A. Weber, *The Bureau of Pensions* (1923), 37-63.

<sup>37</sup> Daniel Hevenor Smith, *The Bureau of Education* (1923), 57-93.

<sup>38</sup> Jenks Cameron, *The National Park Service* (1922), 67-79.

<sup>39</sup> *The U. S. Geological Survey* (1918 Monograph No. 1. Institute for Government Research Series), 73-86.

Director of Personnel and Business Administration which consists of a Personnel Branch, which looks after the appointment, promotion, and records of the employees; a chief clerk who enforces the regulations governing employees, distributes the mail, and assigns floor space; the office of Purchase and Supplies; the Division of Accounts; and the Traffic Manager. The Solicitor's Office gives legal advice to the officers of the department and supervises the enforcement of the laws relating to pure food and drugs, federal road aids, national forests, meat inspection, and land laws. The Director of Information supervises the press and radio services and the editing of the publications of the department.

Subordinate to the Secretary and the Assistant Secretary are three directors who are charged with the supervision of major divisions of the department. The Director of Scientific Work has charge of the Experiment Stations<sup>40</sup> in both the states and territories and, with the assistance of bureau chiefs, directs the work of the Bureaus of Animal Industry,<sup>41</sup> Plant Industry, Chemistry, Soils, Entomology, and Biological Survey, which have for their purposes the furnishing of scientific information to the farmers for the improvement of their soils and the betterment of their plant and animal life. The Director of Regulatory Work supervises the administration of the federal laws relating to agriculture. The Director of Extension is responsible for the dissemination of all new information on agriculture through coöperative agencies and agricultural colleges, among the farmers. County agricultural agents, home demonstration agents, boys' and girls' clubs, and agricultural specialists are found in most of the agricultural counties of the nation and constitute one of the most important educational services of the nation.

Some of the more important bureaus and services of the department are independent of the above scheme of organization and are under the direction of chiefs and directors who are immediately responsible to the Secretary. The Bureau of Home Economics established in 1923 is composed of the divisions of foods and nutrition, economic problems of the home, textiles and clothing, and housing and equipment; and under the direction of an expertly trained woman it investigates the economics of the home and offers advice on its problems. This recognition of the importance of the problems of home life marks an interesting departure in the service of the government. The Bureau of Public

<sup>40</sup> Milton Conover, *The Office of Experiment Stations* (1924), 104-120.

<sup>41</sup> Fred Wilbur Powell, *The Bureau of Animal Industry* (1927), 22-38.



Roads <sup>42</sup> coöperates with the state highway departments in the construction and maintenance of the roads of the national highway system. It experiments with materials for road construction, and studies the cost of road construction, maintenance, and administration. It supervises in coöperation with state agents the building of the roads of which the national government pays a part of the construction costs. It developed the formula for the well-known sand-clay road of which thousands of miles have been constructed since 1916. The National Forest Service supervises 150,000,000 acres of the national domain on which 15,000,000 cattle and sheep graze and 7,000,000 campers and tourists find recreation for the summer months. It prevents and fights forest fires, replants forests with young trees, and generally conserves the resources of the forests. It is really a scientific farmer engaged in the preservation and production of trees. It also aids in the growing of timber on privately owned land, investigates the properties of woods and the processes of their manufacture and utilization, and considers the relation of forests to the public welfare.

The Weather Bureau <sup>43</sup> spends almost two millions a year to learn the secrets of the weather and to give this information to the public for its comfort and safety. It receives telegraphic reports twice daily from 250 local stations, 350 ships at sea, and 50 foreign countries with the result that it can predict the weather rather accurately for 36 to 48 hours ahead and in a general way for a week. The data of these reports cover temperature, atmospheric pressure, precipitation, the velocity of the wind, the state of the weather, and the formation and movement of clouds. The daily forecasts of the bureau are 88.4 per cent correct. The Bureau of Agricultural Economics investigates farm organization, the cost of production and marketing of farm products, farm finance, land economies, and the problems of rural life. It collects, compiles, and interprets statistics concerning the cost of production, transportation, storage, and marketing of farm products, and makes weekly reports of its findings for the benefit of American farmers. The division of coöperative marketing created in 1926 attempts to discover and evaluate the soundest principles and practices of co-operative marketing with a view to furnishing the farmers with such information as will help them market their products effectively.

The Departments of Commerce and Labor had their beginnings

<sup>42</sup> W. Stull Holt, *The Bureau of Public Roads* (1923), 41-55.

<sup>43</sup> Gustavus A. Weber, *The Weather Bureau* (1922), 16-37.

in the bureau of labor statistics created in the Department of Interior in 1884 and made into the Department of Commerce and Labor in 1903 with the emphasis upon commerce due to the rapid development of big business. Labor was dissatisfied with this arrangement and by its constant insistence secured the establishment of a separate Department of Labor in 1913 with its Secretary recognized as a member of the Cabinet.

The Secretary of Commerce is assisted by two Assistant Secretaries and an Assistant to the Secretary in the direction of the activities of the department. The internal affairs of the department are under the control of a chief clerk and superintendent who has under his direction the library of the department, the disbursing office, and the divisions of appointment, publications, and supplies. He is also charged with the enforcement of the department's regulations, the care of its vehicles, the supervision of its expenditures, and the receipt, distribution, and transmission of its mails.

The activities of the department are grouped into bureaus and services headed by chiefs and directors subject to the general supervision of the Secretary and the Assistant Secretaries. The most important division of the department is the Bureau of Foreign and Domestic Commerce <sup>44</sup> headed by a director, four assistant directors, and an administrative assistant and organized into five major groups of activities. There are at Washington the administrative divisions whose titles fairly indicate the nature of their work: (1) Foreign Service Division in charge of the administration of foreign offices; (2) District Offices; (3) Correspondence and Distribution; (4) Administrative Assistant's Office; (5) Drafting and Photostat Work; (6) Accounts Section; (7) Personnel Work; (8) Supplies; and (9) Editorial Work.

The service divisions include the territorial regions of Europe, the Far East, and Latin America. These divisions supervise the work of the Bureau's representatives in these regions; prepare and distribute confidential information to these agents; and furnish appropriate information to commercial bodies, trade journals, and newspapers. They prepare sections for the commerce reports and the weekly and monthly bulletins published by the bureau.

The commodity divisions place the resources of the government at the disposal of basic industries for the extension of their trade. They are coöperating with more than sixty trade organiza-

<sup>44</sup>L. F. Schmeckebier and G. A. Weber, *The Bureau of Foreign and Domestic Commerce* (1924), 78-117.

tions by furnishing expert information through reports, circulars, and answers to questionnaires. There are almost a score of commodity divisions covering a wide range of commodities from farming implements to a pair of hand scales.

There are seven technical divisions which furnish technical information on foreign tariffs, commercial laws, investments, exports and imports, transportation, trade directories of foreign business houses and prospective buyers, and exporters of raw material for American manufactures.

Foreign agencies are maintained throughout the world to report on trade conditions and prospects for American firms. There are more than forty of these foreign offices under the direction of commercial attachés and trade commissioners which supply information to American business men by conference, special reports, replies to inquiries; adjust commercial disputes between foreign and American firms; warn Americans of unfair discrimination or competition; and in general facilitate commercial intercourse between Americans and foreigners.

The Division of Distribution of Commercial Information is a coöperative organization, consisting of (1) the bureau's foreign offices, (2) the service divisions at Washington, (3) the district and coöperative offices, and (4) the bureau's publications.

The Division of District and Coöperative Offices maintains service stations at New York, Boston, Philadelphia, Detroit, Chicago, Atlanta, New Orleans, St. Louis, San Francisco, Seattle, and Portland Ore., for the purpose of expediting the distribution of commercial data and multiplying the contacts between the government and private agencies interested in foreign trade. These stations broadcast over radio foreign trade information throughout the nation. Arrangements are made with commercial organizations in thirty or more additional cities for coöperative branch offices which serve the same purposes as the district offices.

Other agencies of the department directly related to the promotion of commerce are the bureaus of Navigation<sup>45</sup> and Lighthouses, the Steamboat Inspection Service,<sup>46</sup> the Coast and Geodetic Survey,<sup>47</sup> and the aeronautic branch under the direction of an Assistant Secretary for Aeronautics. These agencies are primarily engaged in improving the conditions and physical means involving the safety and extension of commerce.

<sup>45</sup> Lloyd M. Short, *The Bureau of Navigation* (1923), 77-91.

<sup>46</sup> Lloyd M. Short, *Steamboat Inspection Service* (1922), 28-79.

<sup>47</sup> Gustavus A. Weber, *The Coast and Geodetic Survey* (1923), 15-44.

There are still other important bureaus whose activities are possibly more related to the general welfare of the nation than to commerce in particular. The Constitution requires that a census of our population be taken every ten years as a basis for the apportionment of Representatives in Congress. It was not until 1902 that the Census Bureau was established as a permanent agency of the government in the Department of Interior. It was transferred to the Department of Commerce and Labor in 1903, remaining under Commerce when Labor became a separate department in 1913. It is now not only the largest unit of its kind in the national government, but is the largest statistical organization in the world. In a sense the bureau has a double organization: a permanent one for its regular work and a temporary one for handling the decennial census.

The scope of its statistics has constantly broadened until almost the entire life of the nation comes under its survey. The volume of information has become such that the task of the bureau would be impossible of accomplishment but for the most ingenious sort of machinery that automatically tabulates information on cards at the rate of 400 a minute including as many as 60 facts on each card. About 100,000 people are employed in the taking of a census and the statistics cover seven large categories of subject matter, involving population, agriculture, manufacturing, mining, transportation, occupation, communication, religion, charitable institutions, and the financial statistics of states and cities. From an octavo volume of 56 pages, the census report has grown to more than 100 volumes of 40,000 pages.

The Bureau of Fisheries is charged with the protection and development of the fisheries of the United States and Alaska. Its work falls into four main divisions: scientific investigation; fish culture; study of the methods employed in the fishing industry; and protection and regulation. The bureau annually distributes approximately 5,000,000,000 eggs and fishes varying from less than an inch to five inches in length. The propagation, protection, and culture of fish are its major activities.

The Patent Office,<sup>48</sup> transferred to the Department of Commerce in 1925, is the agent by which Congress exercises its constitutional power to promote progress in "science and useful arts." The government grants a seventeen-year monopoly to inventors to secure a clear, full, and accurate description of their inventions in order that the public may use them. After the expiration of this

<sup>48</sup> Gustavus A. Weber, *The Patent Office* (1924), 32-58.



grant the invention becomes public property. The office grants patents and trademarks and secures their protection. Each applicant pays a fee of forty dollars which more than sustains the office.

The Bureau of Standards is the miracle-performing agency of the government and is known as the "house of accuracy." It determines the measures of our groceries, the specifications of the doctor's thermometer, and the formulas of the druggist's prescription. Its machines weigh the crossing of the letter "t" with a pencil mark, and test the strength of the concrete, brick, and steel for construction purposes. It contains the famous Riefler clock which is true to the fifth of a second per month. The behavior of building materials under fire in giant furnaces is studied to aid architects and engineers. In a basement 175 feet long surveyor's tapes are tested and corrected. The china shop of the bureau studies porcelain-making in all its phases and develops recipes for glazes for American industry. The activities of the bureau baffle description and are the bewilderment of thousands of visitors from all over the world every year.<sup>49</sup>

The Department of Labor is the result of a long and persistent demand for the recognition of the interests of the laboring man dating back to 1865. A bureau of labor was created in the Department of Interior in 1884, but it was transferred to the Department of Commerce and Labor established in 1903. The wage earners of the nation, however, felt that this amalgamation was prejudicial to their interests. There was, therefore, a continued and re-enforced demand for a separate department which was established in 1913 to foster, promote, and develop the welfare of the wage earners of the United States.

The department is under the general direction of a Secretary with the aid of an Assistant Secretary and a Second Assistant Secretary who perform such duties as are required by the Secretary or by law. The Assistant Secretary may act as Secretary in his absence and the Second Assistant Secretary enjoys the same privilege in the absence of both the Secretary and Assistant Secretary. The department is furnished a solicitor by the Department of Justice who advises on matters of law. The administrative routine of the department is under the control of a chief clerk assisted by a disbursing clerk, an appointment clerk, chief of the division of publications and supplies, and a librarian. The department contains a carefully selected library of approximately

<sup>49</sup> Gustavus A. Weber, *The Bureau of Standards* (1925), 76-189.

100,000 books and pamphlets on social welfare, being particularly rich in pamphlet material and reports of special investigations embodying the most significant findings in the field of social research.

The major activities of the department are grouped into five bureaus. The Children's Bureau, the Bureau of Labor Statistics, and the Bureau of Immigration and Naturalization, split into the two Bureaus of Immigration and Naturalization, were transferred to the Department of Labor at the time of its establishment, and in 1920 there was added the Women's Bureau.

The Children's Bureau is particularly interested in such phases of child welfare as infant mortality, birth rate, orphanage, desertion, juvenile courts, dangerous occupations, diseases of children, employment, and the legislation of the several states and territories affecting child life. It is empowered not only to investigate these matters but to publish its findings; it is further charged with the administration of the Sheppard-Towner Act, in coöperation with the state governments, for the reduction of maternal and infant mortality.<sup>50</sup>

The Bureau of Labor Statistics is primarily concerned with the relations of capital and labor, earnings and living conditions of laboring men and women, and in general the means of promoting their material, social, and moral welfare. It is also especially charged to investigate the causes and facts involved in the disputes that occur between employers and employees. It publishes periodically bulletins on labor conditions in foreign countries with a view of aiding the industrial interests of the United States.

The Bureau of Immigration administers the laws relating to immigration and Chinese exclusion, and supervises the expenditure of the appropriations for these purposes. It investigates the alleged violation of the immigration, Chinese exclusion, and alien contract labor laws, and in cases of prosecution submits evidence to the proper United States district attorney.<sup>51</sup>

The Bureau of Naturalization under the direction of the Commissioner and Deputy Commissioner of Naturalization and the supervision of the Secretary of Labor has charge of the administration of the laws of naturalization. It investigates the qualifications of candidates for citizenship, supervises the granting of citizenship papers by the Federal and State courts, audits the accounts of the clerks of these courts for all naturalization fees collected,

<sup>50</sup> James A. Tobey, *The Children's Bureau* (1925), 12-31.

<sup>51</sup> D. H. Smith, *The Bureau of Immigration* (1924), 34-111.

and reports quarterly therefor to the auditor of the department concerned.<sup>52</sup>

The Women's Bureau established in 1920 investigates the conditions pertaining to the welfare of women in industry and undertakes to formulate standards and policies to promote the interests of wage-earning women by promoting their efficiency and opportunity for profitable employment. It also seeks to protect wage-earning women from injurious conditions of industrial life and may, at the discretion of the Secretary, publish the results of its investigations.<sup>53</sup>

The United States Employment Service is also a very important agency of this department. It is administered by a Director General with the assistance of an Assistant Director General and a large field force consisting of federal directors for most of the states in coöperation with hundreds of local placement officers. The trend of employment is studied, farm and crop conditions are analyzed, and probable sources of labor supply are estimated with a view of adjusting the supply to the demand for labor. Attempts are made to recruit, direct, and distribute seasonal labor for wheat harvest, cotton and apple picking, corn husking, and the work in the sugar-beet fields and factories. A juvenile service is provided to help schools secure productive and constructive employment for their students best adapted to their abilities.<sup>54</sup>

Somewhat akin to the employment service is the Division of Conciliation in charge of a Director of Conciliation, assisted by an executive clerk, a small clerical force, and a staff of commissioners of conciliation. The commissioners are appointed by the Secretary of Labor from laborers, employers, professional men, and business men, and are paid a per diem of \$8 to \$15, depending on the grade of men and time employed.

The purpose of the Division is to compose labor disputes other than those arising between common carriers and their employees. Its policy has been to intervene in an industrial dispute only upon the request of one of the three parties directly affected: the employer, the employee, or the public. It coöperates with state boards, local committees, city authorities, or other local agencies in the hope that such disputes may be settled before the suspension of work and the creation of bitterness have taken place.<sup>55</sup>

<sup>52</sup> D. H. Smith, *The Bureau of Naturalization* (1926), 21-29.

<sup>53</sup> G. A. Weber, *The Women's Bureau* (1923), 8-13.

<sup>54</sup> D. H. Smith, *The United States Employment Service* (1923), 58-67.

<sup>55</sup> Joshua Bernhardt, *The Division of Conciliation* (1923), 16-20.

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## CHAPTER XVI

### INDEPENDENT ESTABLISHMENTS

On the side of technical administration doubtless the most striking development in American government has been in the number and variety of commissions employed for almost every conceivable purpose and enjoying powers ranging from those of a temporary commission appointed to purchase a portrait for a state capitol to the Interstate Commerce Commission which regulates vast national enterprises.—CHARLES A. BEARD.

#### 1. *Reasons for the Development of Government by Commissions.*

(1) It has long been customary for executives and legislatures to appoint temporary commissions to investigate matters and report their findings. Such commissions were fact-finding agencies and governmental in character only to the extent that their reports influenced the action of the executive or legislature. The English practice of using a board for administrative purposes was adopted by the Continental Congress during the American Revolution and by the French Convention and Assembly during the French Revolution.

(2) In the last fifty years the functions of government have so multiplied that executive and legislative agents have been forced through sheer lack of time to use permanent boards or commissions to share part of their responsibility.

(3) They are in the main, however, a result of the readjustment of the machinery of government to the requirements of a highly technical society. Society will always evolve machinery to suit its needs despite constitutional forms, even by revolution if necessary, pacific or violent. Executives, legislative bodies, and courts became increasingly incompetent for lack of technical knowledge or of proper method of procedure to handle the complicated problems of an industrial society. Legislators did not have the time, nor could judges leave the bench, to investigate the factors involved in the problems which they were called upon to solve.

(4) The rise of corporate wealth, especially public utilities,



calling for a constant and meticulous regulation which could not be provided by legislative fiat, was a strong factor in creating government by commission. It became increasingly clear that corporations could not be allowed to do as they please, yet uniform regulations prescribed by legislative agents, regardless of conditions, practices, or volume of business, would be unjust and impracticable.

(5) Business men disliked for their interests to be handled by politics or to be indefinitely held in the courts. The former method required lobbies and did not always produce satisfactory results, while the latter caused expense and delay.

(6) Jealousy of legislative bodies of executive authority caused them to prefer independent boards and commissions to the delegation of their authority to executive bureaus.

(7) Again, the nature of the authority to be exercised in most instances was legislative rather than administrative in character. When national policies are to be formulated, rules and regulations adopted, and decisions affecting private rights made, fundamental objections exist to the vesting of such powers in a single individual.<sup>1</sup>

2. *Types of Boards and Commissions of the National Government.* In general a commission may be classified according to the nature of the powers exercised. Yet some boards and commissions exercise a variety of functions. The Interstate Commerce Commission is primarily a *legislative* agent, exercising at the same time, however, considerable administrative and judicial authority. The Tariff Commission is *scientific* or *investigatory* in character while the Civil Service Commission is an *examining* body. The Federal Trade and Power Commissions are primarily *administrative* agents while the special Claims Commission for the settlement of disputes between the United States and Mexico might be said to be *arbitral* or *judicial* in character. The Court of Claims, which is really a commission and only a court in personnel and procedure, could probably best be described as a *judicial* commission. The Federal Board for Vocational Education is an *educational* agency. Commissions are also generally *advisory* in character.<sup>2</sup>

3. *Procedure of Commissions.* The value of boards and commissions as governmental agents lies largely in the informality of

<sup>1</sup> See W. F. Willoughby, *Principles of Public Administration*, 119-139; also John Preston Comer, *Legislative Functions of National Administrative Authorities* (1927), 50-112.

<sup>2</sup> This classification is not meant to be scientific or complete, but only suggestive.

their methods of work in contrast to the rather rigid procedure of legislative and judicial agents. They are particularly fitted as a rule in both personnel and procedure to gather the facts on which to base a report, a recommendation, a rule, or a decision. As fact-finding agencies, possessing a personnel of experts and freedom of investigation, they are, generally speaking, very competent. The finding of facts is a function of all commissions. If the commission has the rule-making power with the effect of law, it has the facts at hand and a membership large enough for a balanced point of view and small enough for unity and expedition of decision; these are obvious advantages. If it enjoys judicial power, it is free in its hearings from the complicated procedure of courts; there is no use of the jury system. Of course, from such a commission, under certain restrictions, there is judicial appeal, which constitutes a sort of judicial control. The stronger boards and commissions such as the Federal Reserve Board or the Interstate Commerce Commission have the advantage of formulating and administering their own policies; the doctrine of separation of powers does not prevail in government by commission. The boards and commissions of the National Government by virtue of their adaptability, informality of procedure, and discretion in handling matters have developed a network of relations with state boards and commissions in charge of kindred subject matter which practically amounts to a new political order of vast proportions and significance in the field of federal relations. It is a common practice for members of federal commissions to sit in the meetings of state commissions, debate, and vote, and *vice versa*. This unwritten order or *modus operandi* is much more fundamental in the field of practical government than is generally recognized.

4. *Organization and Functions of Important Boards and Commissions.* The Interstate Commerce Commission established in 1887 is one of the most important regulatory agents of the government; in fact, it is a miniature government. It consists of eleven members appointed by the President with the approval of the Senate for a term of seven years, and is bipartisan in character, no party being allowed more than six of its members, each of whom receives a salary of \$12,000 a year. It has about 2,000 employees in its service.

The work of the commission is divided among thirteen bureaus: formal dockets, informal cases, traffic, law, inquiry, locomotive inspection, safety, signals and train control devices, service, finance, accounts, statistics, and valuation. Each bureau is headed by a director and is organized into sections with a view of greater spe-

cialization and expertness.<sup>3</sup> The administration of the Commission is in charge of an executive secretary who under the supervision of the chairman of the commission looks after appropriations and disbursements, directs the administration of the various bureaus, and acts as the medium of communication between the commission and the public. His office is also the institutional agency of the commission, handling such matters as its mail, files, supplies, and printing. The salary of the secretary is \$7,500 a year.

For hearings the commission sits as a whole and in five divisions, depending on the nature and importance of the matter under consideration. The senior Commissioner of each division is its chairman. By this means a large volume of work can be accomplished with considerable expedition. The work of the Commission is further expedited through hearings conducted by its members throughout the country. The directors of the various bureaus bring matters to the attention of a Commissioner who in turn lays them before the proper division of the Commission. If they are of sufficient importance, involving a general policy or highly controversial matters, they may be referred to the entire Commission. A majority of the Commission constitutes a quorum for the transaction of business, but by the act of August, 1917, it was granted the authority to refer any of its work, business, or functions to a division for majority action with the same effect as if such action had been taken by the Commission, subject always to a rehearing by the Commission.

✓ The functions of the Commission are very broad. It is expected to establish and maintain reasonable and just transportation facilities, rates, classifications, regulations, and practices; to provide for the safety of property, passengers, and employees; and to recommend to Congress legislation for the accomplishment of these ends. It also has control of the transmission of intelligence by wire or wireless involving interstate or foreign relations. Transportation facilities include railroads, steamships, pipe lines, express companies, sleeping cars, bridges, floats, lighters, ferries, switches, spurs, tracks, terminals, depots, yards and grounds. Under transmission of intelligence are included telegraph, telephone, cable, and radio apparatus, or any other wire or wireless instruments used for the receipt, forwarding, or delivery of messages.

The Commission has power to investigate the management of

<sup>3</sup> George Cyrus Thorpe, *Federal Departmental Organization and Practice*, 575-77. See also Joshua Bernhardt, *Interstate Commerce Commission* (1923), 109.

the companies operating any of these agencies and to fine them and imprison their responsible officers for violation of its regulations. By the acts of 1906 and 1910 it was given the power to prescribe just and reasonable rates for the railroads. By the act of 1920 it was made in some respects "a board of directors of the carriers which are conceived for certain purposes of regulation as one great combined system under centralized ownership and control"<sup>4</sup> with the raising and expenditure of its funds largely under the control of the Commission.

The Federal Trade Commission established in 1914 is a logical result of the evolution of the principle of Federal control to which the government committed itself in the establishment of the Interstate Commerce Commission for the regulation of public utilities corporations for interstate traffic. It is also largely the result of the opposition of business men to judicial control of trusts and monopolies and a demand for a tribunal that could adapt a general law to a specific situation and create a continuous policy built upon precedent which would assure business interests of some certainty for investments made in newly organized corporations or combinations. The public also was not satisfied with the anti-trust laws or their enforcement.<sup>5</sup>

The Commission is composed of five members appointed by the President with the approval of the Senate for a term of seven years at a salary of \$10,000 each, not more than three members being allowed from the same party. There is a secretary to each Commissioner as well as an executive Secretary to the Commission. While the principal office of the Commission is at Washington, D. C., branch offices are maintained at New York, Chicago, and San Francisco in charge of legal experts. The Commission may sit and exercise its powers anywhere in the United States.

There are three major divisions of the Commission:<sup>6</sup> Administrative, Legal, and Economic. The Administrative Division is under the direction of the Secretary of the Commission and is divided into several sections having charge of mails and files, supplies, records, finances, library, personnel, hospital, and research along the line of foreign trade.<sup>7</sup>

The Legal Division consists of the investigational and trial branches. The investigational branch is in charge of the chief ex-

<sup>4</sup> Bernhardt, *op. cit.*, 63.

<sup>5</sup> Gerard C. Henderson, *Federal Trade Commission* (1925), 18-19.

<sup>6</sup> W. Stull Holt, *The Federal Trade Commission* (1922), 32.

<sup>7</sup> Thorpe *op. cit.*, 479, and Holt, *op. cit.*, 32-34.



aminer and his staff who conduct the preliminary investigations of alleged violations of the laws enforceable by the Commission, report the facts and the laws involved, and represent the Commission in the taking of testimony, examination of witnesses, and the submission of evidence. The trial board is directed by the Chief Counsel to the Commission and his staff who have charge of all formal proceedings before the Commission and represent it in appellate cases before the courts. This division has branch offices in New York, Chicago, and San Francisco.

The Economic Division is essentially the continuation and enlargement of the Bureau of Corporations which was abolished as such by the Newlands Act establishing the Commission. This division is a very vital part of the Commission and is directed by a Chief Economist with a large and efficient staff. It is the economic research agency of the Commission, and is thus in a position to furnish to the President, Congress, and the public the facts relating to the organization and practices of commercial organizations. It is a valuable adjunct to the legal division and an aid to the President and Congress in the formulation of proper trade legislation.

The Commission is empowered to prevent persons, partnerships, or corporations, except banks and common carriers, from using unfair methods of competition in commerce, price discrimination, unfair contracts, and interlocking directorates, to investigate and report violations of the anti-trust laws at the direction of the President or either house of Congress, to require reports of corporations on the conduct of their business, to investigate foreign trade conditions affecting the foreign trade of the United States, to enforce the export trade acts, and to confer with groups of American business men at their request with a view to eliminating unfair and injurious practices.

The Commission proceeds by means of a complaint issued after charges of alleged violation of the law over which it has jurisdiction have been filed by an individual, partnership, corporation, or association, and have been found after its investigation<sup>8</sup> to

<sup>8</sup> This investigation is made by an examiner whose report and the evidence are carefully considered by the Board of Review, consisting of two lawyers and an economist. This board files an opinion with the Commission with a recommendation as to the proper action to be taken. The Clerk of the Commission assigns the application for the complaint, by rotation, to one of the Commissioners who makes a recommendation to the Commission, which after proper consideration takes action. If it refuses to issue the complaint, the matter is at an end.

justify such action. The complaint which can be issued only by the Commission,<sup>9</sup> contains its charges against the party alleged to be violating the law and sets a day and a place for a hearing. The complaint is then served by the Docket Section upon the accused party who must within thirty days unless the time is extended by the Commission file with it his answer to the complaint, specifically admitting, denying, or explaining such alleged fact in the complaint. After notice to all parties concerned the case is set for the taking of testimony by a trial examiner designated by the Chief Counsel. After the report of the trial examiner to the Commission, briefs are filed by the counsel for both the Commission and the respondent and the case is set for final argument before the full Commission which either sustains or dismisses the charges in the complaint. If, however, the case is not contested and the respondent admits the charges in the complaint, there is no formal trial; the Commission issues an order to the respondent to cease the practice in question. The decision of the Commission is in the form of an order of dismissal or restraint.

In the great majority of cases, the respondents have accepted the orders of the Commission and filed reports indicating their compliance with the terms of the orders. Under certain conditions appeals may be taken to the Circuit Courts of Appeal whose decisions may be reviewed by the Supreme Court. The courts may sustain, modify, or annul the orders of the Commission.<sup>10</sup>

The United States Board of Mediation, established by act of May 20, 1926,<sup>11</sup> for the settlement of disputes between carriers and their employees is composed of five members appointed by the President for a term of five years, by and with the advice of the Senate. They receive a salary of \$12,000 a year and annually designate one of their members to act as Chairman of the Board, which regularly sits at Washington, D. C., but may meet at any other place and employ such assistants as may be necessary to accomplish its work. No person who is interested in carriers or labor organizations is eligible for membership on the Board and any member may be removed by the President for inefficiency, neglect of duty, malfeasance in office, or ineligibility.

The act establishing the Board makes it the duty of carriers and their employees to use every reasonable effort to settle their dis-

<sup>9</sup> The Commission has authority to issue a complaint only when it "shall have reason to believe" that the law over which it has jurisdiction is being violated.

<sup>10</sup> Henderson, *op. cit.*, 48-103; Thorpe, *op. cit.*, 753-764.

<sup>11</sup> This act abolished the Railroad Labor Board.

putes through representatives or adjustment boards created by agreement between employer or employers and employees. When this process has failed, the parties, or either party to the dispute may invoke the services of the Board or it may proffer its good offices in the following cases: (1) a dispute arising from grievances or the interpretation or application of agreements concerning rates of pay, rules, or working conditions; (2) a dispute over changes in rates of pay, rules, or working conditions; or (3) any other dispute not settled by conference between the parties.

If the Board fails by mediation to effect a settlement between the parties, it becomes its duty to endeavor to induce them to submit the controversy to arbitration. When an agreement between the parties to arbitrate has been made and filed with the Board, a board of arbitration is selected in the following manner: each party to the dispute, carrier or carriers and employees, selects one arbitrator or two, according to the agreement, and these select the remaining arbitrator or arbitrators. In case of failure of the arbitrators selected by the parties to the dispute to agree on the additional arbitrator or arbitrators, it then becomes the duty of the board of mediation to choose the other arbitrator or arbitrators.

The agreement to arbitrate must be in writing and must stipulate, among other things, that the parties to the dispute will abide by the award of the board of arbitration, copies of whose decision must be furnished the parties to the dispute, the board of mediation, the Interstate Commerce Commission, and the clerk of the district court of the United States in whose district the controversy arose or the arbitration agreement was made. If the dispute is not adjusted by this process and, in the judgment of the board of mediation, substantially threatens to deprive any section of the country of transportation service, it shall so notify the President who may, at his discretion, appoint a board to investigate the dispute and report its findings.

The Federal Reserve Board established in 1914 as the governing body of the Federal Reserve Banking System consists of eight members, the Secretary of the Treasury and the Comptroller of the Currency being *ex-officio* members and the other six members being appointed by the President by and with the advice of the Senate for terms of ten years and receiving salaries of \$12,000 a year and all expenses involved in the performance of their duties. The Secretary of the Treasury is Chairman of the Board, but one of the six appointed members is designated by the President as the Governor of the Board and its active executive. There is a

Vice-Governor to serve as Governor in his absence. There is associated with the board a Federal Advisory Council composed of a representative from each of the twelve Federal Reserve Districts annually selected by the board of directors of the Federal Reserve Banks of these districts. This council meets four times a year at Washington, and oftener if called by the Federal Reserve Board, and may offer advice as to discount rates, note issues, and general banking conditions in their respective districts. The salaries and expenses of the members of the Federal Reserve Board are paid by semi-annual assessments made by the Board on the capital stock and surplus of the Federal Reserve Banks on a pro-rata basis.

The Federal Reserve Board has general supervision of the affairs and conduct of the twelve Federal Reserve Banks located in different sections of the country and is invested with the power to discount the paper of member banks, to issue Federal Reserve Notes to such banks, and to perform such other banking functions as are required by the Federal Reserve Act. The Board is further empowered to examine at its discretion the accounts, books, and affairs of Federal Reserve and member banks, and to require such statements and reports of these banks as it deems necessary. It may fix the rate of interest for the rediscount of the paper of Federal Reserve Banks, remove their officials, write off of their books worthless assets, and even liquidate their affairs when in its judgment such action is necessary. It has some supervision over national banks which are, however, for the most part under the control of the Comptroller of the Currency.

The Federal Power Commission, established in 1920, is composed of the Secretaries of War, Interior, and Agriculture, one of whom is appointed Chairman by the President. The Commission appoints an executive Secretary who under its supervision has direction of its staff which is composed of engineers, attorneys, accountants, and clerks in about equal numbers from the Departments of the three Secretaries composing the Commission, and organized into the divisions of law, engineering, accounting, and operations. The Secretary assigns the staff to its specific duties and supervises "the conduct, preparation, and publication of all investigations, valuations, hearings, and reports."<sup>12</sup>

The Commission has "administrative control over all water power sites and kindred establishments located on the navigable waters, the public lands, and the reservations of the United States." It issues licenses and permits "for the construction, oper-

<sup>12</sup> Milton Conover, *The Federal Power Commission* (1923), 76.



ation, and maintenance of dams, reservoirs, power houses, water conduits, transmission lines, and kindred projects.”<sup>13</sup> It regulates the financial operations of water power licensees, including rates of service, makes physical valuations of the properties of power enterprises, and controls the character of their services. It cooperates with the commissions of those states which Congress authorizes to enter into compacts for the apportionment of the water of rivers.

In view of the tendency towards electrification of industry by means of water power, the rapid exhaustion of coal and the consequently increasing cost of its use, the rising standards of living, the supplying of new devices by science for the more effective utilization of water power, its inexhaustibleness in the United States, and the movement toward regional organization and development by compacts between the states, the functions of the Federal Power Commission promise to increase in scope and usefulness. It has been estimated that the potential water power resources of the United States are 53,905,000 horsepower, that they could do the work of 500,000,000 tons of coal annually. The new industrial revolution has already made it clear that the utilization of hydro-electric power is not restricted to milling industries and cities but that it may be employed to extract nitrogen from the air, to manufacture fertilizer from phosphate rock, to operate mines, transportation facilities, and farm machinery, to light and heat country homes, to milk cows, churn butter, cook, sew, launder, and sweep.

In response to a prolonged agitation for a more scientific method of studying the factors involved in tariff legislation comparable somewhat to the means used by European governments whose permanent officials deal with such matters on a factual basis, there was created in 1916 the United States Tariff Commission of six members appointed by the President by and with the advice of the Senate for terms of twelve years at a salary of \$7,500 a year. Not more than three members of the Commission shall belong to the same party and the President shall annually designate the Chairman and Vice-Chairman. The Commission has the power to employ a Secretary and such expert assistance as its work requires.<sup>14</sup> The Secretary of the Commission, subject to its general supervision, directs the administration of its work and its institutional services consisting of library, stenographic, supply, telephone, multigraph, and mimeographic services.

<sup>13</sup> Thorpe, *op. cit.*, 670.

<sup>14</sup> *Ibid.*, 651.

The functional services of the Commission are performed by expert lawyers, accountants, economists, and investigators, for which purpose there have been established the following divisions: legal, accounting and statistical, commodities, foreign tariff and international commercial relations.<sup>15</sup> The Commission is not a quasi-legislative or judicial body as is the Interstate Commerce or Federal Trade Commission nor does it exercise administrative powers. It is an investigational and advisory agent. Its business is primarily to conduct research and furnish information to Congress and the President on tariff legislation, policies, and administration. Since the advice of the Commission does not have to be taken, the value of its services depends very largely on the degree to which the tariff ceases to be a political issue.

Since 1862 when public lands were donated to the several states and territories for the benefit of agricultural and mechanical colleges, the national government has become increasingly interested in vocational education; and this has resulted in the creation of the Federal Board of Vocational Education in 1917, which consists of the Secretaries of Agriculture, Commerce, and Labor, the United States Commissioner of Education, and three citizen members appointed by the President by and with the advice of the Senate for three year terms at a salary of \$5,000 a year, and representing commercial, agricultural, and labor interests, respectively. The Board annually elects one of its members as chairman<sup>16</sup> to preside at its meetings and execute its decisions.

The Board coöperates with state boards for vocational education which have been established in all of the states. The state boards submit annually their programs for the approval of the Board, showing the kinds of schools and classes to be aided, the method of administration and supervision to be followed, the qualifications of the teachers, and the courses and methods of instruction.<sup>17</sup> When the Board approves the plans submitted by the state vocational boards, it certifies to the Secretary of the Treasury the states that have met its requirements and the amounts each is entitled to receive.

The grants are made annually for these purposes: (1) the payment of salaries of teachers, supervisors, and directors of agricultural subjects; (2) the payment of salaries of teachers of trade,

<sup>15</sup> Joshua Bernhardt, *The Tariff Commission* (1922), 39-42.

<sup>16</sup> W. Stull Holt, *The Federal Board for Vocational Education* (1922), 5-6.

<sup>17</sup> Thorpe, *op. cit.*, 718.

home economics, and industrial subjects; and (3) the training of teachers, supervisors, and directors of these subjects. For the first purpose, the allotment of funds is made in the proportion which the rural population of the states bears to the total population of the United States; for the second, in the proportion which their urban population bears to the total urban population of the nation; and for the third, in the proportion which their total population bears to the total population of the country. The amount of the appropriation for all purposes now amounts to more than \$7,000,000 annually and, of course, must be matched by the states dollar for dollar. The administration of the allotments is in the hands of the state boards for vocational education in accordance with regulations and supervision.

In addition to passing on the plans of the state boards for vocational training and distributing Federal aid, the board is "to make or cause to have made studies, investigations, and reports, with particular reference to their use in aiding the states in the establishment of vocational schools and classes and in giving instruction in agriculture, trade and industries, commerce and commercial pursuits, and home economics."

The United States Employees' Compensation Commission was created by act of September 7, 1916, but was not organized until March 17, 1917. It is composed of three members appointed by the President by and with the advice of the Senate for terms of six years, one member being designated as Chairman by the President and not more than two being members of the same party. All previous compensation acts and methods of administration were superseded by the act establishing the Commission under which this service was centralized, except that the Governor of the Panama Canal Zone and the Chairman of the Alaskan Engineering Commission administer the compensation act for these services.<sup>18</sup>

The staff of the Commission is organized into the following divisions whose names indicate their functions: assembly, claims, medical, legal, disbursing, and statistical. The Secretary of the Commission in addition to caring for purchases, personnel, records, publication, and publicity is in charge of the assembly division which collects the papers of the claimants until they constitute a complete claim and then transmits them to the claims division which examines each case to see if the facts presented are in accordance with the provisions of the compensation act, and, after action by

<sup>18</sup> *Ibid.*, 653-54.

the Commission, notifies the claimants of the awards or disallowances.<sup>19</sup>

The compensation act assures compensation, including reasonable medical and hospital treatment, to all civil employees of the Federal Government, employees of the District of Columbia except firemen and policemen, and officers and enlisted men of the Naval Reserve on authorized training duty in time of peace, who sustain personal injuries while in the performance of their duties, but no compensation will be paid if the injury is caused by the willful misconduct of the employee or by his intention to bring about the injury or death of himself or another, or if intoxication of the injured employee is the proximate cause of the injury or death. There is a schedule of benefits for permanent partial disability, and compensation for total disability is two-thirds of the average weekly pay, but in no case is to exceed \$25 per week or to be less than \$8 per week. Death benefits are payable to widows until remarriage, to children until eighteen years of age, and to other dependents under certain conditions. Total compensation for either injury or death is in no case to exceed \$7500. Reasonable funeral expenses not to exceed \$200 are provided.

The United States Shipping Board created in 1916 was subsequently enlarged to consist of seven members appointed by the President by and with the advice of the Senate for terms of six years at salaries of \$12,000 a year. Not more than four of the Commissioners may come from the same political party, and two must be appointed from the states touching the Pacific, two from those touching the Atlantic, and one from those touching the Gulf of Mexico, one from those bordering the Great Lakes, and one from the interior, but not more than one from the same state. The Board is allowed a Secretary at a salary of \$5,000 a year and a staff of experts and employees for the proper performance of its duties. The Chairman of the Board is designated by the President.

Administrative routine is under the direction of the Vice-Chairman assisted by disbursing and budget officers. The staff is organized into the bureaus of traffic, operations, constructions, law, finance, research, and regulation, whose titles are fairly significant of their functions.

The Board exercises administrative, legislative, and judicial powers over our foreign commerce and interstate commerce by

<sup>19</sup> Gustavus A. Weber, *The Employees' Compensation Commission* (1922), 30-35.



water, exercising in this respect similar powers to those of the Interstate Commerce and Federal Trade commissions and using similar methods of procedure.<sup>20</sup> Its chief interest is in ocean transport. While it was established as a war measure to create a naval auxiliary, a naval reserve, and a merchant marine (the last purpose being accomplished through a subsidiary government corporation, the Emergency Fleet Corporation), it has since the war been engaged in operating the merchant marine and in selling its vessels to private parties. Since it is evident that our merchant marine, even when it is completely placed in private hands, will require government aid for its efficient maintenance and since it must be subject to draft by the nation as an auxiliary to the navy, it would seem that some government control will be necessary.<sup>21</sup>

The Board of Tax Appeals, created by the Act of June 2, 1924 and continued by the Act of February 26, 1926, consists of sixteen members appointed by the President and Senate for twelve year terms. For administrative purposes, the members of the Board are divided into sixteen divisions for the hearing of cases. The principal office of the Board is at Washington, but for the convenience of taxpayers provision is made for hearings at suitable points throughout the country.

The Board functions after the manner of a Court. Its procedure is governed by the rules of evidence applicable in the courts of equity of the District of Columbia. Its hearings are public and its records are open to public inspection. A fee of \$10 is charged for the filing of a petition. It hears and determines all appeals on taxes levied by the United States. Appeals from its decisions may be taken by individuals or corporations to their respective Circuit Courts of Appeals, or to the Court of Appeals of the District of Columbia, if they do not live or are not located in the jurisdiction of any Circuit Court of Appeals.

The Radio Commission established in 1927 to regulate radio communication is to coöperate with the Department of Commerce in the control of a unique industry, whose product is distributed without cost to the consumer. Technical factors limit the number of broadcasting stations which may operate in a given area without interference. Moreover, ether does not recognize either state or national boundary lines. Unrestrained broadcasting activity could

<sup>20</sup> For a more extended discussion of its extensive organization and activities, see Thorpe, *op. cit.*, 682-704.

<sup>21</sup> The Civil Service Commission, the Personnel Classification Board, and the Bureau of Efficiency are treated in connection with the Civil Service.

## INDEPENDENT ESTABLISHMENTS

not only cause national complications but also hamper scientific experimentation by restricting the use of wireless telegraphy. The Commission is composed of five members appointed by the President by and with the advice of the Senate for terms of six years. The Commission is a Court of Appeals for hearing and deciding appeals of broadcasters from the rulings of the Secretary of Commerce.

To promote the more effective merchandising of agricultural commodities in both interstate and foreign commerce, Congress in 1929 established a Federal Farm Board consisting of the Secretary of Agriculture, *ex officio*, and eight members appointed by the President, by and with the advice and consent of the Senate, for terms of six years at a salary of \$12,000 a year.

The board is specifically empowered (1) to promote the principles and practices of coöperative marketing of agricultural products, (2) to encourage the organization and development of coöperative associations, (3) to make reports on crop prices, prospects, and the supply and demand of farm products at home and abroad, (4) to investigate the causes of the over-production of agricultural products and recommend means of its prevention, and (5) to make investigations and reports upon land utilization, reduction of acreage, market expansion at home and abroad, and methods for increasing the use of agricultural products and the improvement of the transportation facilities for their marketing. The theory underlying the entire scheme is that coöperative marketing controlled by the farmer can be made effective by the aid of the government.

There is a large number of miscellaneous bureaus, boards, and commissions, joint committees, and boundary commissions which exercise supervision over important services and institutions both national and international in character such as the Library of Congress, hospitals, educational institutions, Pan-American Union, printing, narcotics, and international disputes between the United States and Mexico or Canada. Many of these boards are composed of *ex-officio* members and material on their organization and duties is readily accessible.<sup>22</sup>

<sup>22</sup> Thorpe, *op. cit.*, 783-839. *The Congressional Directory*, and *The Code of Laws of the United States of America* (1926).

## CHAPTER XVII

### THE REORGANIZATION OF NATIONAL ADMINISTRATION

The administrative branch has had a development analogous to that of a rambling group of buildings composed of successive accretions of wings, additions, sheds, and outlying structures, each erected to meet a specific need, but not designed with any reference to the production of a harmonious assembly of buildings.—  
W. F. WILLOUGHBY.

1. *The Need for Reorganization.* The need for a thorough reorganization of the administrative agencies of the National Government is but the inevitable result of the historical process of institutional development. It is unreasonable to expect a political organization founded a century and a half ago and treated with indifference ever since to function with even a degree of satisfaction, especially in a country where within this period such tremendous social changes, expansion in territory, growth of population, and multiplication of government activities have taken place.

By executive orders and acts of Congress the administrative machinery of the National Government has repeatedly been modified and expanded to meet the demands of the moment. In such instances action was intrusted to whatever agency already in existence seemed best fitted for the task. If, however, no such agency was available, a new organization was either created or authorized. Sometimes it became the nucleus of a new department, but more frequently it was placed in one of the existing departments or made interdepartmental or independent. Chief consideration was always given to the provision for action rather than the agency through which the government was to act. In the main, expediency, the individualities of heads of departments, bureaus or offices, and practical grounds rather than scientific considerations dictated the selection of the agency. The result is that the administrative branch of the National Government is a veritable hodgepodge of incongruities.

This mathematical monstrosity resulting from indefensible addi-

tions and subtractions was fittingly characterized by Herbert Hoover when he pointed out that public work construction and direct aids to merchant marine are found in each of fourteen bureaus or establishments, conservation of national resources in eight, direct aids to education in six, direct aids to industry in five, direct aids to veterans, government of territories and dependencies, and public health in four, and that all the bureaus and establishments participate in the purchase of \$250,000,000 of supplies annually.<sup>1</sup>

Almost endless duplication, resulting in overstaffing, useless expense, poor housing conditions, and inadequate salaries, is not the worst of the evils of this spacious labyrinth because the American people are able and willing to pay for adequate and competent public service. It is the inefficiency that must result from the fact that heads of departments and bureaus are forced to attempt to direct the work of services which bear little or no relation to the major function of these units. In the Department of Treasury are found such anomalies as the "little navy" or coast guard service, public health, and prohibition enforcement; in War are public works and insular affairs; in Interior are found such diversities as education, Indian affairs, patents, and pensions unrelated to the public lands which are the chief object of the attention of this department; in Agriculture is the Bureau of Public Roads which belongs to a department of public works, and also the Forest Service which apparently should be grouped with the activities of the Department of Interior; and in Commerce is the Bureau of the Census which is no more related to commerce than to agriculture or interior; it is an educational service. These are only a few of the illogical groupings of departmental activities which prevent proper supervision and coöperation.<sup>2</sup>

There are, of course, legislative agents exercising administrative functions and administrative agents exercising legislative and judicial powers. The principle of the separation of powers has been forgotten in the establishment of independent bureaus, boards, and commissions. Many of these agencies should be placed in properly organized departments and the administrative functions of all of them should be under the direction of executive agents. Lack of systematic records, diversities in procedure, and variations in accounting systems also exist. Doubtless new departments are

<sup>1</sup> Address of Herbert Hoover before the Thirteenth Annual Meeting of the Chamber of Commerce of the United States, May 21, 1925.

<sup>2</sup> John Philip Hill, *The Federal Executive*, 76 *et seq.*



needed, and a replacing of the emphasis on various government activities more in harmony with the present structure of society.<sup>3</sup>

2. *Efforts at Reform.* "Official inquiries into the conduct of business in the executive departments of the national government have been made from time to time since the beginning of the government. The inquiries have been made under various auspices, by order of bureau chiefs, of heads of departments, of the President and of Congress itself. They range in scope from inquiries into special details of administrative practice to general investigations of the organization and business practices of the executive departments."<sup>4</sup> Since 1888 four important commissions, two under Congressional direction and two under the orders of the President, have examined the organization and administrative methods of the executive departments of the National Government with a view to placing its management on an efficient basis. Several changes in administrative routine resulted from these investigations but they were restricted almost entirely to clerical detail.

The Cockrell Commission (1887-88) created by Senate resolution of March 3, 1887, consisted of five United States Senators, and examined the business methods, amount of work, and number of employees of the executive departments to determine the causes for the delay in the transaction of their business. Certain items of business were traced from their beginning to consummation. The committee found that 39 employees were engaged in copying by long hand the letter press copies of letters into record books, that proxies were being substituted for employees at lower salaries, that in the land office 276,670 cases were pending and 14,000 letters unanswered, and that some transactions were handled 76 times before complete approval was obtained.<sup>5</sup> The result of the work of the commission was an investigation of the treasury and war departments and the institution of more efficient procedure.

The Dockery-Cockrell Commission (1893-1895), a joint committee of three members from both the Senate and the House, undertook, with the assistance of experts, a more thorough examination of the organization and methods of the executive departments and other governmental establishments at Washington. The Commission's reports related to the laws governing the

<sup>3</sup> See W. F. Willoughby, *The Reorganization of the Administrative Branch of the National Government* (1923), 60 et seq.

<sup>4</sup> Gustavus A. Weber, *Organized Efforts for the Improvement of Administration in the United States* (1919), 44.

<sup>5</sup> The Commission published a report in four volumes, *Senate Reports*, 50 Cong., 1st Sess., No. 507, III, IV.

organization of the executive departments and their actual organization, showing in tabular form the offices, bureaus, and divisions with the number, age, sex, and years of service of their employees. It was the first examination of its kind since the foundation of the government. (As a result of the recommendations of the Commission, several laws were passed, improving existing methods and abolishing useless services.<sup>6</sup>

The Keep Commission (1905-1909) consisted of four representatives from the executive departments appointed by President Roosevelt without congressional authorization. By means of assistant committees composed of government employees a mass of material was gathered and collected into eighteen reports, the major part of which was not published. (They dealt primarily with business methods and practices of the executive departments.)<sup>7</sup>

The President's Commission on Economy and Efficiency (1910-1913) was created by President Taft but was authorized by Congress which appropriated a total of \$260,000 for defraying the expenses of the inquiry, leaving, however, full discretion to the President to determine the scope of the inquiry and the methods to be followed in its prosecution.

This commission was composed of six members and was headed by Dr. F. A. Cleveland, then Director of the Bureau of Municipal Research of New York City. To assist the commission, the President requested each head of a department and of several of the independent establishments to appoint from his subordinates a committee on economy and efficiency to make inquiries into the organization and business methods of their respective establishments. The commission in coöperation with these special committees made a thorough examination of the problems of a national budget, organization of the administrative agencies of the government, personnel, financial procedure, and business practice.<sup>8</sup> Congress took no action on the reports of the commission.

In submitting the report of the commission on the organization of the government in a special message to Congress, President Taft significantly characterized the situation as follows: "This vast organization has never been studied in detail as one piece of administrative mechanism. Never have the foundations been laid for a thorough consideration of the relations of all of its parts. No

<sup>6</sup> In *House Reports*, Nos. 49 and 88 and *Senate Reports*, Nos. 41 and 47, 53 Cong., 1st Sess.

<sup>7</sup> "Message of the President," *Senate Docs.*, No. 162, IV, 59 Cong., 1st Sess.

<sup>8</sup> Weber, *op. cit.*, 87.

comprehensive effort has been made to list its multifarious activities or to group them in such a way as to present a clear picture of what the government is doing. Never has a complete description been given of the agencies through which these activities are performed. At no time has the attempt been made to study all of these activities and agencies with a view to the assignment of each activity to the agency best fitted for its performance, to the avoidance of duplication of plant and work, to the integration of all administrative agencies of the government, so far as may be practicable, into a unified organization for the most effective and economical dispatch of public business."<sup>9</sup>

3. *Recent Proposals.* As a result of the expansion of the government's activities due to the war and the consequent burden of taxation for its maintenance and payment of the war debt, reorganization has become an even more pressing problem. Three very suggestive proposals have been made, one official and two by private agencies. Reference is made to the Joint Committee,<sup>10</sup> the Institute for Government Research, Washington, D. C., and the National Budget Committee of New York City. Comparison of these proposals with the existing departmental organization may be tabulated as follows:

EXISTING SYSTEM	PROPOSAL OF THE JOINT COMMITTEE <sup>11</sup>	PROPOSAL OF THE INSTITUTE <sup>12</sup>	PROPOSAL OF THE BUDGET COMMITTEE <sup>13</sup>
1. State	1. State	1. State	1. State
2. War }	2. National	2. National	2. War }
3. Navy }	Defense	Defense	3. Navy }
4. Treasury	3. Treasury	3. Treasury	4. Treasury
5. Justice	4. Justice	4. Justice	5. Justice
6. Post Office	5. Communica-	5. Post Office	6. Post Office
7. Agriculture	tion	6. Agriculture	7. Agriculture
8. Commerce	6. Agriculture	7. Commerce	8. Commerce
9. Labor	7. Commerce	8. Labor	9. Labor
10. Interior	8. Labor	9. Public Works	10. Public Works
	9. Interior	and Public	11. Education and
	10. Education and	Domain	Health
	Welfare	10. Education and	
		Science	
		11. Public Health	

<sup>9</sup> Message of the President, *House Doc.*, No. 1252, 62 Cong., 3d Sess.

<sup>10</sup> Congress by joint resolution of December 17, 1920, created a Joint Committee on Reorganization, consisting of three members of the Senate and three of the House appointed by the presiding officers of these bodies. Later by a supplemental joint resolution it was provided that the President might be represented on the committee by his own appointee.

<sup>11</sup> This proposal was worked out by the Joint Committee in Coöperation with the President and Cabinet and was endorsed by them. See *Senate Document*, No. 302, 67 Cong., 4th Sess.

<sup>12</sup> Willoughby, *op. cit.*, 33-43.

<sup>13</sup> See *A Proposal for Government Reorganization* (1921), 8.

It is noticed that the three proposals agree in their recommendations for the establishment of Departments of Public Works<sup>14</sup> and Education and Health; the Institute, however, proposes to make a separate Department of Public Health. It also agrees with the Joint Committee that War and Navy should be combined into the Department of National Defense. In the reallocation of the services of the different departments and establishments, which after all is the major problem in reorganization, these proposals are in substantial agreement. Their details may be found in the proposals themselves to which references have been made.<sup>15</sup>

4. *General Principles of Reorganization.* (1) The administrative branch of the national government should be regarded as a "single integrated piece of administrative mechanism." "By this", says Willoughby, "is meant that the several administrative services, instead of being viewed as isolated or independent units, should be treated as working parts of a general organization to the end that each, while having its distinct sphere, will work in harmony with all the others towards the attainment of common objects."<sup>16</sup> The President is responsible for the administration of the government, but the complexity of its functions makes effective coördination and supervision of its services practically impossible. The application of this principle would not only simplify its organization but would make possible a unified and economical program of its activities for the administration as a whole as well as for each department. Conflicts of jurisdiction and duplication of organization, activities, and plant could be discovered and eliminated.

(2) All services of an administrative character should become a part of this integrated or departmentalized mechanism if executive supervision is to be effective. Many administrative duties are now being performed by independent bureaus, boards, and commissions over which the President has little or no authority further than the appointment of their members. Even a conversation of the President with their members is a fit subject for a sensational headline. Such establishments, if they are exclusively administrative in character, should be incorporated in the appropriate executive department; if they are also quasi-legislative and quasi-judicial in character, their administrative functions should be assigned

<sup>14</sup> The proposal of the Joint Committee retains the title of Interior, but the grouping of its activities shows it to be a Department of Public Works.

<sup>15</sup> *Principles of Public Administration*, 81.

<sup>16</sup> Since the appearance of these proposals, several bills have been introduced in Congress, proposing modified forms of reorganization, but as yet the subject remains one largely of academic interest.



to the proper department, leaving their legislative and judicial powers subject to the supervision of Congress and the courts.<sup>17</sup> The Constitution undoubtedly contemplates administrative unity in the President.

(3) The grouping of activities into departments should be based upon their functional character. The actual function performed rather than the character of the activity is the line of kinship which should determine the departmentalization of the services. In other words, it should first be determined what fundamental and distinct functions the government is to perform, create separate departments for these functions, and then group the services on the basis of the analogous character of their functions to those of the departments. This does not mean that there should be departments of lawyers, chemists, statisticians, and engineers, because all these groups differ among themselves in the functions which they perform. One department might need mechanical engineers, another chemical, and a third electrical. Hence, specialized function determines the proper relation for departmentalization.

(4) Departments should be unifunctional in character as far as practicable. This means that they should not only include the services that contribute to their general functions but should also exclude those unrelated to their major purposes.

(5) It also follows that the number of departments should be determined not by tradition or the interests of professional groups or the number of departments of some foreign government but by the major functions which the character of our society and our political order make it desirable for the national government to perform. It is the opinion of the experts on this subject that a mere shuffle of the activities of the government among the present departments will not effect a proper reorganization of national administration, but that combinations, eliminations, and additions of departments should be determined by the structure, needs, and tendencies of American society.

5. *Some Important Mechanical Features of Reorganization.* (1) A Bureau of General Administration. Reason as well as recent events in American politics indicates that it is humanly impossible for the President to keep in touch with the activities of the administrative agencies of the government employing more than a half million people. In fact, the larger and more important rôle assigned him by the Constitution and public opinion in the fields of legisla-

<sup>17</sup> *Principles of Public Administration*, 88-89.

tion, political leadership, and international politics makes it undesirable that the minutiae of administration should consume his time.

The general staff idea has been gaining recognition in recent years.<sup>18</sup> The Taft Commission on Economy and Efficiency recommended and secured the establishment of a Division of Efficiency of the Civil Service Commission in 1913,<sup>19</sup> which was made into the independent Bureau of Efficiency in 1916. This Bureau studies the problems of organization, personnel, and the business methods of the various departments and independent establishments and makes recommendations to Congress for their improvement.

The Budget Bureau established in 1921 with authority to "assemble, correlate, revise, reduce, or increase the estimates of the several departments and establishments," and nominally placed in the Department of Treasury is very largely a general bureau of administration. What is needed, however, is a bureau comparable in status and powers to the English Treasury which has the authority to direct, supervise, and control the activities of the operating services.<sup>20</sup> A bureau of this type attached to the President's office would enable him to inform himself concerning the organization, duties, and activities of the services of the government, to give intelligent consideration to their requests, and effectively to supervise the administration as a whole for which he is responsible.

(2) Departmental Bureaus of Administration. The Secretaries of the executive departments are with reference to their services in about the same relation as the President is to the administration as a whole. Any comprehensive survey of the activities of these departments leads to the conclusion that their heads whose time is largely consumed by matters of policy cannot properly supervise their work. The President and his Secretaries should not be reduced to a set of office clerks. This is not the American conception of their duties. There should, therefore, be a bureau of administration in each department coördinated and articulated with the general bureau of administration under the President.

<sup>18</sup> Leonard D. White, *Introduction to the Study of Public Administration*, 110.

<sup>19</sup> "Without such an organization the government must continue to develop along the lines that it has followed in the past, viz., lines of Congressional control, and isolated, independently functioning, bureaucratic administration, with all of its friction, its jealousies, its handicaps, its wastes, its lack of responsibility for work undertaken and for the efficiency of results obtained." "Message of the President," February 26, 1913, *Senate Doc.*, 1113, 62 Cong., 3 Sess.

<sup>20</sup> Willoughby, W. F., Willoughby, W. W., and Lindsay, S. M., *The System of Financial Administration of Great Britain* (1917), *passim*.

These bureaus should contain the institutional services <sup>21</sup> of the departments and be charged with the responsibility of their administration. They should be placed under the direction of the First Assistant Secretaries or similar officers of the departments who should be held responsible for their efficient and economical administration. Such bureaus would facilitate the establishment of uniform business methods, secure the coöperation of the various services, and aid in the making of budgetary estimates. The heads of these bureaus would be in a position to have a true perspective of the activities of their respective departments and to judge of their financial needs on a basis of facts. They might well be the budgetary officials of the departments, and, with the Budget Director, constitute the budgetary machinery of the government.

"Another important feature of this system of organization," says Professor Willoughby, "is that the official placed in charge of this bureau should be the First Assistant Secretary. If this is done each department will be given an officer corresponding in status and duties to the Permanent Undersecretary of the Administrative Department of the British Government, a feature of the British governmental system which has won the universal commendation of students of that government."<sup>22</sup> Their duties being technical in character, there would be no reason for changes in administration to affect their tenure in office; in fact, lay cabinet secretaries would doubtless be anxious to retain their services. Vacancies in these offices could be filled by the promotion of capable subordinates.

(3) The Functions of Other Assistant Secretaries. At present there prevails no uniformity in regard to the status and duties of Assistant Secretaries of the various departments. In some departments, he is the direct assistant to the Secretary for all purposes apparently, a sort of utility man;<sup>23</sup> in others he is a general supervisor of certain services;<sup>24</sup> in a third type, he is the direct administrator of the services.<sup>25</sup> The last method provides a much closer scheme of organization and fixes responsibility in a single

<sup>21</sup> Institutional services apply to the department as a whole and are listed by Professor Willoughby as follows (*Principles of Public Administration*, 108): 1. Office of Chief Clerk, 2. Division of Mails and Files, 3. Division of Personnel, 4. Division of Supplies, 5. Division of Accounts, 6. Division of Printing and Publications, 7. Office of Superintendent of Building.

<sup>22</sup> *Ibid.*, III.

<sup>23</sup> Navy, Commerce, Agriculture, and Labor.

<sup>24</sup> Treasury is the best example.

<sup>25</sup> Reference is made to the Assistant Postmasters-General.

officer in contrast to the typical system which diffuses responsibility between two or three officials.

(4) The Extension of the Undersecretaryship. There is now an Undersecretary or an Assistant to the Secretary in the departments of Treasury, Justice, Interior, Agriculture, Commerce, and Labor. With specific administrative duties assigned to the Assistant Secretaries, the office of Undersecretary would become relatively more important, and should become a feature of the organization of each department. Because of his personal touch with the Secretary, a relation similar to that prevailing between the President and his secretary, he could so thoroughly know the policies of his chief as to be able to relieve him of many duties and act for him in his absence. It would be expected that he would be a political officer, a personal selection of the Secretary, and would change with the head of the department.<sup>26</sup>

<sup>26</sup> For further details of a program of reorganization of national administration, see the works of Professor W. F. Willoughby previously cited in this chapter.



## CHAPTER XVIII

### THE NATIONAL CIVIL SERVICE

1. *The Evolution of the Merit System in National Administration.* The problem of personnel in modern administration, whether of private or public institutions, involving the selection, promotion, demotion, removal, remuneration, protection, and retirement of employees, is one of the most difficult that heads of institutions have to face. The growth in the functions of government, their increasingly technical character, and the consequent army of experts that the public service requires have fostered the development of a science of public administration. The proportions of the personnel problem in the administration of the government of the United States can be comprehended only when it is realized that exclusive of the legislative, judicial, military, and naval branches of the government, there are more than a half-million employees in its service in whose appointment and management the electorate does not directly participate. Indeed, there are only 533 elective officials in the government of the United States—The President, the Vice-President, 96 Senators, and 435 Representatives.

The present practices that govern the recruitment of the National Civil Service are the result of a prolonged agitation for the merit system as a means of displacing partisanship as the chief factor in the employment of our public servants. This contest for a more scientific method of handling the national service has been characterized by three rather distinct phases. The first, extending from Washington's inauguration to the close of John Quincy Adams's administration, was roughly characterized by a rather honest desire to give due consideration to the aptitude and personal fitness of prospective appointees. After the crystallization of political parties in Washington's second administration, political affiliation made steady inroads upon earlier practices; not, however, to any very great impairment of the service. While during this period, Jefferson is said to have introduced the "Spoils Sys-

tem"; in most instances his changes seem to have been demanded by the interest of the service.<sup>1</sup>

The second period, extending from 1829-1833, witnessed the progressive expansion, if not the inception, of the "Spoils System," which was already intrenched in both state and municipal government.<sup>2</sup> Andrew Jackson found that the Tenure of Office Act of 1820, limiting the terms of federal officials to four years, facilitated the execution of his policy of spoliation typified by the slogan "To the victors belong the spoils."<sup>3</sup> Under Jackson and his successors a quadrennial overturning of the great majority of federal employees became the rule. Office became the award for party loyalty and general usefulness in enhancing party fortune.<sup>4</sup>

Despite the deleterious effects of such a system upon the public service, there were for many years only sporadic outbursts of disapproval from disappointed politicians and civil service reformers. In 1853 Congress passed an act providing that the clerks in the departments at Washington should be grouped into four classes and that appointment should be based on an examination conducted by a board of three examiners appointed by the head of the department in which the vacancy existed.<sup>5</sup> This act, though to some extent a sign of progress, was an abortive effort at reform.<sup>6</sup> It established a pass-examination system characterized by the Civil Service Commission as containing the following weaknesses:

(1) The examinations were really open only to the favorites of members of Congress and political bosses.

(2) The tenure of the members of the examining boards was uncertain.

(3) The examinations were individual rather than competitive; hence, the hands of the government were tied by the fear of offending the supporters of the applicant.<sup>7</sup>

Following closely upon the heels of the Civil War, interest in the improvement of the public service was renewed, due to the startling disclosures of speculation and other species of scandal in official positions. As a by-product of this agitation, Congress in

<sup>1</sup> See Jefferson, *Writings* (Washington Ed.), IV, 402-405.

<sup>2</sup> Howard Lee McBain, *DeWitt Clinton and the Origin of the Spoils System in New York* (1907), *passim*.

<sup>3</sup> C. R. Fish, *The Civil Service and the Patronage* (1904), 65-70.

<sup>4</sup> W. D. Foulke, *Fighting the Spoilsman* (1919), *passim*.

<sup>5</sup> 9 *Stats. at L.*, 211.

<sup>6</sup> Lewis Mayers, *The Federal Service* (1922), 41-42.

<sup>7</sup> *Ibid.*, 42-43.

1871 passed an act empowering the President to prescribe such regulations for the admission of persons into the Civil Service of the United States as would best promote its efficiency and to appoint suitable persons to conduct inquiries in respect to the age, health, character, knowledge, and ability of applicants.<sup>8</sup> This act proved ineffectual because of the inadequate appropriation made by Congress for its execution and its chief significance lies in the fact that it is still a constituent element in the vast bulk of legislation affecting the selection of federal employees.

The third period in the development of the national Civil Service dates from the passage of the Pendleton Act of 1883, which constitutes the foundation upon which by later statutes and regulation the present machinery for solving the personnel problems of the National Civil Service has been established. This measure which is generally called the Civil Service Act primarily provides for the selection and promotion of federal employees on the basis of merit and their protection against political coercion. It represents the culmination of a long period of vigorous agitation on the part of numerous agencies bent upon mitigating the pernicious influences to which the spoils system gave free rein. The shock which the nation received from the assassination of President Garfield in 1881 by a disappointed office-seeker undoubtedly hastened the accomplishment of this reform.

2. *The Civil Service Commission.* The Act of 1883 authorized the President to appoint, by and with the advice and consent of the Senate, a Civil Service Commission composed of three members, not more than two of whom may be members of the same party. They are appointed without terms, are removable by the President at will, and receive a salary of \$7,500 a year with traveling expenses. The Commission is placed under the exclusive control of the President in order to make it independent of all the service agencies of the government.<sup>9</sup>

The Commission was first organized March 9, 1883, and now consists of the following seven divisions: (1) Application, (2) Examination, (3) Investigation and Review, (4) Research, (5) Field Force, (6) Appointment, and (7) Staff, Accounts and Purchasing, Disbursing, Personnel, and Library. The first five divisions are under the direction of the Chief Examiner, the Appointment Division is in charge of the Secretary to the Commission, and the seventh division is supervised directly by the Com-

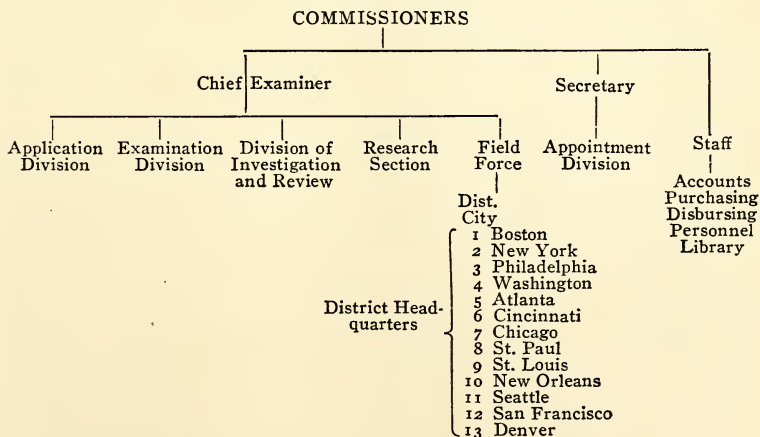
<sup>8</sup> 16 *Stats. at L.*, 514.

<sup>9</sup> 5 U. S. C. A., Ch. 12.

mission.<sup>10</sup> The present force of the Commission (1928) consists of 285 clerks and examiners, 25 sub-clerical employees at Washington, and 142 employees in the field force.<sup>11</sup> This force is supplemented by more than five thousand local examining boards composed of government officials located in the districts in which the local headquarters of the Commission are found.<sup>12</sup>

While the powers of the Commission are not as comprehensive as those of similar agencies in some of the states and cities, they are sufficiently broad to make it a very useful instrumentality in the improvement of the federal service. The Civil Service Act requires the Commission to assist the President in making suitable rules for its efficient administration. Among other things the act requires that these rules shall provide for (1) competitive examinations, (2) the making of appointments, (3) the apportionment of appointments in the departments at Washington among the several states and territories, (4) a period of probation before absolute appointment, (5) the prohibition of the use of coercion of employees in political action by officials, (6) investigation touching the enforcement of the rules of the service.<sup>13</sup> The re-

<sup>10</sup> This chart of the organization of the Commission is reproduced from G. C. Thorpe, *Federal Departmental Organization and Practice*, 618.



<sup>11</sup> *Congressional Directory*, January, 1928, 413.

<sup>12</sup> Numerous other agencies such as the bureau of efficiency, the personnel classification board, the bureau of the budget, the Comptroller-General, the employee's compensation commission, the pension bureau, and the Post Office Department are associated with the Commission in the performance of its work.

<sup>13</sup> Darrell Hevenor Smith, *The United States Civil Service Commission* (1928), 41-75.



tirement act of July 8, 1926, authorizes the Commission to grant certificates for the retention of employees beyond the retirement age at the request of the department concerned and requires it to keep such record of individual service as will promote the determination of rights under the retirement act. It is also the duty of the Commission to furnish the Commissioner of Pensions such information from time to time as may be necessary for the proper adjustment of any claim for annuity and to make an annual report to the President to be transmitted to Congress, indicating the character of its work for the year and making recommendations for the improvement of the service.

3. *The Scope of the Merit System.* There are two kinds of service recognized by the Act of 1871: (1) the classified and (2) the unclassified. Under this act, the President may extend the examination system, competitive or non-competitive, to positions not under the classified service. The merit principle has gradually been extended by acts of successive Presidents and Congresses until it now applies to about seventy-five per cent of the employees of the government.<sup>14</sup> The following groups of officers and employees are without its scope: (1) about seventeen thousand "presidential" appointees, chiefly diplomatic representatives and postmasters, (2) some twelve thousand incumbents of positions specifically excluded by law, such as deputy collectors of internal revenue, (3) federal judges appointed under constitutional provisions and not in the administrative service of the government, and (4) some fifty thousand common laborers.

4. *The Examinations.* The Chief Examiner appointed by the Commission at a salary of \$6,000 a year has direct supervision of the system of examinations and the procedure of the local examining boards. The Examining Division (see chart) under his direction prepares the questions for written examinations, has them printed and distributed, passes on eligibility of applicants, reports on examination papers, conducts the examinations held at Washington, and supervises those held in the districts. The Application Division has charge of the receipt, record, and review of applications, the furnishing of information to the public concerning the government service, and the preparation and distribution of examination announcements.<sup>15</sup>

<sup>14</sup> The extension of the merit principle may be indicated as follows: 1883 to 13,294 employees; 1897 to 87,108; 1905 to 178,807; 1916 to 296,926; 1927 to 422,998, due largely to the increase in number of employees.

<sup>15</sup> Thorpe, *op. cit.*, 415.

The examinations must be practical, and may be oral or written, and administered individually or collectively, depending on the nature of the positions involved. They are intended to test the relative capacity and fitness of the applicants for the particular position sought. It is in this respect that the American system differs most from the English, which seeks to discover the capacity of the applicant by a general examination, leaving the final placing of the applicant in the service to special fitness and adaptability indicated by experience. It has been charged that the American examinations are too scholastic or academic and are mere memory exercises, while the English system is a test of intellectual ability and appeals to the college-trained person. On the other hand, it has been contended that the English service is arranged in the interest of the intellectual and social aristocrat and is, therefore, unsuited to American ideals. Both systems have their advantages and disadvantages and both possibly should be more flexible. For the relatively more important government positions the English system would seem preferable, while for a great many places of almost purely clerical nature the American method seems satisfactory.<sup>16</sup> The greater emphasis that is placed upon the professional character of public service in Great Britain may be urged as a justification of their higher educational requirements. More or less mediocrity will be found in the American system until our service is professionalized.

The examinations are conducted at such times and places as the needs of the service and the convenience of the applicants require. In most instances the examinations are held at the request of the departments, though vacancies occur with such frequency as to warrant the holding of periodic examinations. After an examination is ordered it is announced in the newspapers and notice is posted in post-offices and other public buildings. Examinations are rated on a basis of one hundred, the various subjects being given such relative weight as the Commission has prescribed. Competitors receiving a grade of seventy or above are eligible to appointments.

Only American citizens are eligible to the examinations except when the demands of the service are not met by citizen applicants. There are, however, certain disqualifications, including dis-

<sup>16</sup> For a comparison of the two systems, see Chief Examiner Wales, *Thirteenth Annual Report of the United States Civil Service Commission* (1913), 28-29; also R. Moses, "The Civil Service of Great Britain," 57 *Columbia Univ. Studies* (1914), No. 1, Ch. X.

missal from the service for delinquency or misconduct within a year preceding the date of application, physical or mental unsuitability, criminal or immoral conduct, and perjury in connection with securing the examination. The examinations are given without charge, and the number of applicants always exceeds the number of vacancies.<sup>17</sup>

5. *Appointments.* A list of eligibles is kept on the official registers of the Commission at Washington and the Secretaries of the Districts. When a vacancy arises in the classified service in the District of Columbia, the names of the three highest on the list of eligibles for the particular vacancy in question are certified by the Commission to the appointing officer, who must select one of the three unless it appears that some one or two of the list are disqualified for any of the above reasons. The secretaries of the districts perform a similar function with respect to the vacancies arising within their respective districts. The discretion thus allowed the appointing officer frequently permits the intervention of political influence, and at present is not sufficiently circumscribed to insure the making of appointments "with sole reference to merit and fitness." There is, however, a list of "preference eligibles," composed of all war veterans honorably discharged, who by statute are given certain advantages. Their ratings are arbitrarily raised five points, and, in cases of disabled veterans, ten points.

One of the basic principles of the Civil Service Act is that all appointments shall be made on a probationary basis. This period has been fixed by the rules of the Commissioners at six months, but may be extended to one year by agreement between the Commission and the department concerned. If the conduct or service of the probationer proves unsatisfactory, a written notification to him to this effect discontinues his service. Definite appointment begins only after the expiration of the period of probation. An eligible is dropped from the registers by appointment or at the end of one year without appointment and can be restored only by a reëxamination. Generally not more than two members of a family are eligible to appointment.<sup>18</sup> An attempt is made to apportion appointments among the several states and territories according to population.

6. *Protection of Civil Servants Against Removal.* Since the

<sup>17</sup> During the fiscal year ending June 30, 1927, 267,340 persons were examined and only 46,534 received appointments. *Congressional Directory*, January, 1927, 413.

<sup>18</sup> Mayers, *op. cit.*, 428-429.

power of removal is according to the holdings of the courts incidental to the power of appointment, there can be no guaranteed immunity in this matter. An Act of 1912 provides that no employee in the competitive service may be removed except to improve the service. Nor may an official or employee be removed for refusal to render party service or contribute to campaign funds. Charges of inefficiency or dishonesty against an employee must be made in writing by the appointing agent and an opportunity of refutation in writing must be allowed. There is no right of hearing before dismissal. Practically, there is not much risk of removal as long as the appointee abstains from partisan politics. He is, of course, permitted to discuss political matters and to vote as other citizens, but he is expected to refrain from using his position to influence in any way the actions or opinions of other persons. A presidential order of 1907 forbids participation in political conventions or caucuses, addressing political meetings, aiding in preparing party resolutions or platforms, and publishing and distributing campaign literature. Infractions of such regulations are investigated by the Commission but dismissal is in the hands of the appointing authority. The courts will not review removal proceedings, holding that such matters as "An employee's fitness, capacity, and attention to his duties are questions of discretion and judgment to be determined by the heads of the departments." <sup>19</sup>

7. *Promotion.* A satisfactory system of promotion on a basis of merit is an essential of an efficient civil service. The adoption of an equitable and at the same time administratively sound policy of promotion in an organization of such vast proportions as the federal service is, however, a baffling problem. The conflicting interests of the public, the employees, and the management as well as the relative emphasis to be accorded such factors as seniority, examinations, and service ratings must be considered. Furthermore, the extent to which such factors shall be allowed to control the discretion of superior officers in making promotion is equally puzzling. In fact no criterion can be made the basis of action in all cases and under all circumstances.<sup>20</sup>

At present the practices of the government in this matter could not be called a policy without sacrificing the dignity of the term. The Civil Service Act states that no person in the classified service shall be promoted "until he has passed an examination" unless he

<sup>19</sup> *Taylor v. Taft, Secretary of War*, 24 App. D. C. 95.

<sup>20</sup> W. F. Willoughby, *Principles of Public Administration*, 306-315.



is exempted by law. Pursuant to this requirement, the rules of the Commission prescribe competitive lists or examinations as a means of determining fitness for promotion. Any test which the promoting officer desires to apply may, with the approval of the Commission, be used under certain limitations. Examinations, however, are only one measurement of efficiency. Such personal qualities as adaptability, dependableness, accuracy, and mental alertness are in the long run very important and only experience can reveal their prevalence. In recognition of this fact a Division of Efficiency was created in 1913<sup>21</sup> under the direction of the Commission to establish a system of "efficiency rating" for the classified service at Washington to be based on records systematically kept by the departments and to be used by the appointing officers, along with the information resulting from examination, in making promotions. The division of efficiency was converted into the Bureau of Efficiency in 1916 and made an independent agency under the direction of a chief appointed by the President and the Senate. It should be part of an administrative bureau of the President's office.

The duties of the Bureau are (1) to establish and maintain a system of efficiency ratings for the services at Washington, (2) to investigate their needs with respect to personnel, (3) to consider duplication of services and methods of business in the various services of the government, and (4) to aid the Personnel Classification Board in the proper grouping of positions in the departmental services. The work of the Bureau is done through co-operation, advice, and laboratory tests without publicity or partisanship. It operates at the requests of either or both houses of Congress, congressional committees, and the heads of departments, bureaus, and independent establishments. It has already established and put into operation a system of efficiency ratings, providing (1) a minimum rating for promotion, (2) a rating necessary to prevent demotion, and (3) a rating which must be maintained to remain in the service. It has also secured the adoption of recommendations as to business methods that are effecting tremendous savings.

8. *Compensation.* Government service in the United States whether national, state, or municipal has never paid in proportion to private enterprise and as a result has never commanded the most able talent of the nation. Evaluating positions, services, and employees is merely playing with statistics unless the efficient can be properly remunerated during active service and protected

<sup>21</sup> Act of March 4, 1913 (37 Stat. 750).

against poverty after retirement. In the past in the federal service there has been very little attention given to the development of a scientific policy of remuneration for employees, with the result that in many instances the grossest sort of salary incongruities and inequalities has existed.<sup>22</sup> This matter is an inextricable part of the broader problem of classifying and standardizing the positions in the classified service.<sup>23</sup>

In 1919 Congress began the serious study of this problem<sup>24</sup> and as a result passed the Classification Act of 1923, establishing a Personnel Classification Board consisting of the Director of the Bureau of the Budget, a member of the Civil Service Commission, and the Chief of the Bureau of Efficiency, or alternates designated by these agencies. The Director of the Budget Bureau is Chairman of the Board. The Board was given power to (1) classify the 60,000 civilian positions in the District of Columbia, (2) allocate newly created positions, (3) investigate appeals from assigned classification grades, and (4) pass upon reductions and dismissals from the service on account of inefficiency.<sup>25</sup> The Board was also empowered to study the foreign services and to report a plan to Congress for its improvement along similar lines.

The Act of 1923 provided a range of salaries according to the character of the service,<sup>26</sup> increases in compensation upon the attainment and maintenance of the proper efficiency ratings, and equal compensation for equal work irrespective of sex. Unfortunately, the expectations of the proponents of this measure have not been realized, due largely to friction among the members of the Board. It is undoubtedly a step in the right direction and the reform contemplated will eventually be realized.

9. *Retirement System.* Closely akin to the problem of adequate compensation during the active period of the service of an employee is that of properly retiring him when his usefulness has

<sup>22</sup> Mayers, *op. cit.*, Ch. VII.

<sup>23</sup> L. D. White, *Introduction to the Study of Public Administration*, 279.

<sup>24</sup> See the *Report of the Congressional Joint Commission on Reclassification of Salaries*, Ho. Doc. No. 686 (Mch. 12, 1920).

<sup>25</sup> Thorpe, *op. cit.*, 734.

<sup>26</sup> The scheme of classification, grades, and salary range provided by the Act:

CHARACTER OF SERVICE	NO. OF GRADES	SALARY RANGE
1. Professional and scientific	7	\$1800 to \$7000
2. Sub-professional	8	900 to 3000
3. Clerical, administrative, and fiscal	14	1140 to 7500
4. Custodial	10	400 to 3000
5. Mechanical	5	45 to 90c an hour.

ended.<sup>27</sup> The retention of numerous individuals in the federal service beyond their period of efficiency and making no provision for their retirement has been one of the greatest abuses of the service. While the military and naval forces have enjoyed retirement allowances almost from the foundation of the government, the principle of civil pensions was not recognized until about the middle of the last century, and it made little headway until after the World War. The apathy of Congress, if not its hostility, to this reform was difficult to overcome.

The Retirement Act of 1920 as amended in 1926 constitutes the basis of the present retirement system.<sup>28</sup> It makes provision for a compulsory, part-contributory plan of annuities for all employees in the classified service of the federal government, and, with certain exceptions, of the District of Columbia.<sup>29</sup> Employees are divided into grades according to the number of years' service prior to the age of retirement, those of each grade being entitled to annuities according to a fixed scale. The standard retirement age is seventy, although mechanics, letter carriers, and post office clerks are privileged to retire at sixty-five, and railway postal clerks at sixty-two. Attainment by an employee of the retirement age appropriate to his position automatically discontinues his service unless the Civil Service Commission approves the request of the head of the department for his retention in the service. This Act, however, contemplates the restriction of such continuances to four years after it has been in operation ten years.

Three and one-half per cent of the basic salary or other compensation of employees subject to the provisions of the act is deducted by the government and deposited in the Treasury of the United States to the credit of the "civil service retirement and disability fund." If a retiring employee has been in the service at least fifteen years, he is entitled to a pension, varying according to the length of his service, from thirty to sixty per cent of his average salary for the ten years preceding his retirement. A maximum limit of \$1,000 is placed upon annuities in the case of employees whose period of employment exceeds thirty years. Disabled employees who have not reached the age of retirement and whose disability is so serious as to render them incapable of "useful and efficient service" are similarly made beneficiaries of the

<sup>27</sup> See L. Meriam, *Principles Governing the Retirement of Public Employees* (1918).

<sup>28</sup> John T. Doyle, "The Federal Civil Service Retirement Law," 113 *Annals of the Am. Acad. of Pol. and Soc. Sci.*, 330-338 (1924).

<sup>29</sup> 41 *Stat. at L.*, 614.

system, provided their incapacity is attributable to no fault of their own.

Much adverse criticism has been leveled at this system by both employees, who emphasize the inadequacy of the annuities, and experts, who regard the plan as defective from an actuarial point of view.<sup>30</sup> Sufficient time has not yet elapsed since the modifications of 1926 to determine the extent to which the inherent weaknesses of the system have been eliminated, but inasmuch as they were framed primarily with this result in view, it is believed that its merits in the course of time will be more generally recognized.

10. *Organization of Government Employees.* The civil servants of Great Britain, Germany, France, and a number of other countries have long been bound together through the medium of public employees' organizations for the purpose of improving their status.<sup>31</sup> The unionization of the federal employees of the United States, however, has been relatively a recent movement.<sup>32</sup> It began with the formation of the National Association of Letter Carriers in 1890, followed by the establishment of the United National Association of Post Office Clerks in 1899, the creation of the Railway Mail Association in the same year, and the organization of the National Rural Letter Carriers' Association in 1903; and culminated in the establishment of the National Federation of Federal Employees in 1917, composed of hundreds of local federal employee unions in the United States, its territories, and possessions.

While it is doubtless true that the various federal employee unions, not unlike all highly organized aggregations of human beings, embody "the springs of substantial good and the possibilities of great harm," it is evident that on the whole their activities have been productive of substantial benefits both to the employees and to the public service. Fortified by the strength that is latent in united action, they have fought vigorously to maintain the principles of the merit system. Furthermore, they have consistently supported the ideals of scientific pension legislation, classification of positions in the federal service, standardization of compensation schedules, and salutary working conditions.<sup>33</sup>

<sup>30</sup> See White, *op. cit.*, 346-348; M. Conover, "Pensions for Public Employees," *Am. Pol. Sci. Rev.*, XV, 350-365.

<sup>31</sup> See W. C. Robeson, *From Patronage to Proficiency in the Public Service* (1922), *passim*.

<sup>32</sup> S. D. Spero, *The Labor Movement in a Government Industry* (1924), *passim*.

<sup>33</sup> For a comprehensive discussion of the many federal employee unions and their multiform activities, see Mayers, *op. cit.*, Ch. XVI.



II. *Further Improvement of the Service.* Considerable improvement in the federal service must yet be made before it can be favorably compared with those of the more advanced European countries. Omitting reference to the variety of its technical deficiencies with which the administrative expert alone is competent to deal, and about which there is already a voluminous literature,<sup>34</sup> it may be said that the paramount prerequisite to a further strengthening of the service—and one that will *ipso facto* eradicate numerous ancillary weaknesses—is the broadening of the scope of the merit principle to include many of the higher administrative posts now filled by political appointment. The Civil Service Commission has repeatedly voiced its conviction that the primary factor operating to prevent individuals of first-rate ability from entering the public service is that the opportunities for advancement to positions of higher salary and responsibility are conspicuously lacking.<sup>35</sup> The President is to-day obliged to fill some seventeen thousand positions. In addition to first-, second-, and third-class postmasterships, the President names all of the chief officials outside of Washington in the Department of Justice and in the internal revenue, the customs, the reclamation, the mint, the public lands, and the immigration services. While the President is without authority to place these offices in the classified service, there is nothing to prevent his subjecting prospective occupants of these positions to examination, as was done in the case of the first three grades of postmasters.<sup>36</sup> Only congressional action, however, can place these offices in the competitive classified service, and this step should be taken.

The inexpediency of formal examination systems as a means of selecting officials entrusted with the formulation of public policy is generally admitted. On the other hand, no valid reason can be given for not extending the merit principle to include all those officers and employees whose duties are purely administrative in character.<sup>37</sup> It is obvious that the most responsible positions in the federal service are still regarded as the legitimate rewards for political service and are frequently filled without regard for the needs of the service or the interests of the nation. As long as the door to

<sup>34</sup> A. W. Procter, *Principles of Public Personnel Administration* (1921); Willoughby, *op. cit.*; and White, *op. cit.*

<sup>35</sup> *Thirty-eighth Annual Report of the U. S. Civil Service Commission* (1921), xxxiv.

<sup>36</sup> *Executive Order* of May 10, 1921.

<sup>37</sup> J. A. McIlhenny, "The Merit System and the Higher Offices," 11 *Am. Pol. Sci. Rev.*, 461-472.

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these major positions is closed to men and women of character, training, and ability, they will refuse to accept the minor places and become the minions of politicians, who are generally without training and frequently without character.

$$\begin{array}{r} 337 \\ 222 \\ \hline 11.5 \\ 65 \\ \hline 180 \end{array}$$

## CHAPTER XIX

### THE HOUSE OF REPRESENTATIVES

#### I. ITS ESTABLISHMENT AND PURPOSE

The House of Representatives, like the House of Commons of Great Britain, is the national element in our Congress. Like lower houses of all national parliaments, it was instituted to give a representative character to the legislative body of the nation; the Congress of the Confederation represented only states. It is the result of the compromise previously mentioned in connection with the work of the Federal Convention, and, next to the House of Commons, is the oldest representative body of modern governments. It is the only directly representative agent of the National Government.

The House of Representatives is the nation in miniature. It is a mosaic of American life, representing its extremes, mediocrities, and diversities, whether of a social, temperamental, political, or religious character. The provincial character of its membership drawn as it is from districts organized on a basis of population necessarily makes it reflect the heterogeneity of American life.

It is thoroughly American in its temperament. It will slavishly submit to the control of its Speaker for a series of years, and to the dictation of the Senate and President, and then suddenly become revolutionary in character. It will defeat measures as a committee of the whole, transform itself into the House by rising from its seats, and approve what it has just defeated as a committee. It will oppose civil service as a committee and then originate a revenue bill to extend the services of the Civil Service Commission. It will adopt an elaborate set of rules of procedure, then move their suspension or reconstruct the Rules Committee. It will organize itself under the Constitution and then construct an extra-legal organization for transacting its business. "It can vote by acclamation in the twinkling of an eye," says Professor Young, "640 millions of dollars for national defense, or it can spend the entire afternoon on the hilarious and farcical discussion of a bill providing a whipping-post for wife-beaters in the District of

Columbia.”<sup>1</sup> It loves order but prefers to proceed without restraint. It sees no inconsistency in these matters, recognizing as practical men that theory is only academic. In its display of such marvelous versatility it has become the object of not only the admiration of the American people, but of the criticism of reformers.

Its representative feature has made it possible for our system of government to adapt itself to the needs of a large population spread over an imperial domain. In speaking of “the equal rights of man,” Thomas Jefferson said: “Modern times have the signal advantage, too, of having discovered the only device by which these rights can be secured, to wit, government by the people, acting not in person, but by representatives chosen by themselves.” Direct election and a short term of office make the House the agent of the public opinion of the nation. “As it is essential to liberty that the government in general should have a common interest with the people, so it is particularly essential that the branch of it under consideration should have an immediate dependence on, and an intimate sympathy with, the people. Frequent elections are unquestionably the only policy by which this dependence and sympathy can be effectually secured.”<sup>2</sup>

## II. BASIS OF ITS MEMBERSHIP

The membership of the first House was arbitrarily fixed by the Convention of 1787 as there was no accurate census at the time to be used as a basis of apportionment. After the census of 1790 was compiled, its membership was apportioned among the states according to their population, counting, however, only three-fifths of the slaves as population and “excluding Indians not taxed.”<sup>3</sup> The abolition of slavery broadened the basis of representation and to prevent its restriction by the States, the Fourteenth Amendment provides for a reduction of the number of representatives of a state which abridges the voting privileges of the adult male citizens of the United States “except for participation in rebellion, or other crime.”<sup>4</sup>

After each decennial census since 1790, except that of 1920, Congress has made a reapportionment which has always increased the membership of the House except that of 1842. Its membership

<sup>1</sup> *The New American Government and Its Work* (1923), 4.

<sup>2</sup> *The Federalist*, No. LII (Lodge Ed., 329).

<sup>3</sup> *The Constitution*, Art. I, Sec. 2.

<sup>4</sup> *Ibid.*, Art. XIV, Sec. 2.



has increased from 65 to 435. Reapportionment is determined by Congress, which fixes by law the membership of the House at a certain number. Then the aggregate population of all the states is divided by this number to secure the federal ratio. By dividing the population of each state by this ratio, the number of representatives for each state is obtained. Because of the constant shift in the population of the nation, causing along with other factors some states to increase in population more rapidly than others, it does not follow that an increase in the membership of the House means an increase in the number of representatives for each state. The federal ratio has grown from 30,000 to a little less than 212,000 in 1910. The population of a state must increase proportionately in order for its number of representatives not to be decreased. Some states have failed to maintain their former quotas of representatives. In fact, Delaware, Nevada, Arizona, New Mexico, and Wyoming would be without any representatives under the present ratio but for the constitutional guarantee that "each State shall have at least one Representative."<sup>5</sup>

One would gain the impression from this discussion that the Representatives of the House bear a proportional ratio to the population of the nation. This, however, is not the case, because the congressional districts are arranged by the state legislatures on a partisan basis. District lines are frequently drawn in such fashion as to give very fantastic shapes to the districts, the purpose being to exclude or include certain political groups with a view of making as many districts in the state Democratic or Republican as possible. A Democratic legislature will gerrymander<sup>6</sup> in the interest of the Democratic party and a Republican legislature will favor the Republican party. By this means the legislatures of the various states are able to give a disproportionate representation to the dominant political groups of their respective states. The result is a House of Representatives unduly partisan and actually unrepresentative.<sup>7</sup> The states, however, cannot change

<sup>5</sup> *The Constitution*, Art. I, Sec. 3.

<sup>6</sup> This practice of the state legislature is known as "gerrymandering" because it was first used in Massachusetts in 1812 when Elbridge Gerry was governor.

<sup>7</sup> In Tennessee, the Republicans poll about 43% of the vote of the state. A Democratic legislature graciously gives the Republicans two Representatives and modestly takes eight for themselves. In 1892 a Democratic legislature of Indiana so gerrymandered the state as to enable the Democrats with a vote of 259,190 to secure eleven Representatives while the Republicans with a vote of 235,668 were able to elect only two Representatives.

the number of the Representatives until Congress makes a new apportionment.

Federal law requires the districts to be composed of compact and contiguous territory,<sup>8</sup> but it has been held that territory is contiguous if it touches the district at any point. Two counties of a state whose corners are a common point are contiguous territory. This makes it possible for a political architect to take a county or a group of counties and by ingenious additions or subtractions to make a district of almost any political coloring desired. The statutory requirements that districts be as nearly equal in population as possible are also disregarded. Sometimes a district will contain almost twice the population of another district in the same state.<sup>9</sup>

The district system was made compulsory by the reapportionment act of 1842 for states having more than one representative but has since been modified so that a state receiving an increase in its quota of Representatives may elect them at large, or if its quota is decreased, it may abolish its districts entirely and elect all its representatives at large. This method makes it possible in such instances for the majority party to secure all the representatives of such a state or the representatives at large.<sup>10</sup>

The remedy for this situation is to make representation proportionate to the votes actually cast by the various political groups. This system of representation is practiced in Germany, France, and Belgium. This would not only make the House of Representatives more truly representative of population but also replicative of the actual political order. It would also stimulate voting since representation of a party would depend on the number of votes it polled in congressional elections. It would invigorate party life in each state, but since both parties are under the impression that they are profiting from the present practice, it is likely that such reform will remain almost purely academic for some time. The franchise is a means of securing representation, and its exercise should achieve this result. If, however, the system of representation is so manipulated as to defeat the chief object of voting, an inactive electorate is inevitable and the democratic principle is destroyed.

<sup>8</sup> Act of August 8, 1891 (37 Stat., 13).

<sup>9</sup> In 1905, the fifteenth congressional district in New York (Republican) contained a population of 165,701 while the eighteenth district (Democratic) had a population of 450,000.

<sup>10</sup> Illinois has two representatives at large at the present time (1929).

### III. QUALIFICATIONS, TERM OF OFFICE, AND COMPENSATION OF MEMBERS

The Constitution requires a representative to be at least twenty-five years of age and an inhabitant of the state from which he is chosen, and to have been a citizen of the United States for seven years. The House by virtue of being the judge of the qualifications of its members has excluded regularly elected members possessing the constitutional qualifications.<sup>11</sup> Can the House impose additional qualifications to those required by the Constitution? Constitutionally no; practically yes.<sup>12</sup> If the House can set a moral standard for its membership, presumably it could require additional qualifications. There seems to be no recourse for an individual who is denied his seat on such grounds except to be repeatedly elected until the House relents.<sup>13</sup> The courts regard the action of the House in such matters as political in character, and therefore will not take notice of it. Undoubtedly the framers of the Constitution intended that the constitutional qualifications alone should be required. Of course, the House could admit such persons to membership and then unseat them by a two-thirds vote. This method would satisfy constitutional requirements and accomplish the same purpose, but it would be doing indirectly what the other method accomplishes directly. If the House is inclined to exclude a member-elect disqualified in its judgment, it prefers to withhold his seat, since this can be done by a mere majority vote.

Custom has added that a representative must be a resident of the district from which he is elected. Several states have also added this qualification by statute. While this is a part of the unwritten constitution, it is so firmly fixed that no party would assume the risk of defeat involved in offering a candidate from another dis-

<sup>11</sup> The Fifty-sixth Congress excluded Brigham H. Roberts of Utah because he was a polygamist. The committee that reported in favor of this action contended: "Must it be said that the constitutional provision, phrased as it is, really means that every person who is twenty-five years of age and who has been for seven years a citizen of the United States and was when elected an inhabitant of that state in which he was chosen, is eligible to be a member of the House of Representatives and must be admitted thereto even though he be insane or disloyal or a leper or a criminal? Is it conceivable that the Constitution meant that crime could not disqualify? The whole spirit of the government revolts against such a conclusion."

<sup>12</sup> See "The Legal Qualifications of Representatives," 3 *Am. Law Rev.*, 410-411.

<sup>13</sup> An illustration of this method is the case of Victor J. Berger who was repeatedly elected to the House from a Wisconsin district and was finally given his seat.

trict. This is the logical expression of the American theory of territorial representation and presents a wide contrast to the European practice of permitting a candidate to stand for election in the district of his choice.

Each system has its advantages and disadvantages. The district system brings the candidate in close contact with his constituency and possibly makes it easier for the voters to make a choice. On the other hand, it narrows their choice and may thereby force the selection of an inferior representative when a wider range of choice would have ended in the selection of an experienced and more capable person. It also prevents a party from keeping its most capable leaders in office, since a defeat in one district is final until the next election day. It has been the experience of every nation that has tried the district system that it secures a set of representatives who are constantly seeking by dubious methods to promote the interests of their districts at the expense of the nation. Should a national legislative body have a district or a national point of view? The district system in American politics may be more justifiable than in European politics because the constituency of an American representative is two or three times as large in both territory and population as that of the European representative. On the other hand, in a federal system of government in which there are local representative institutions it may be questioned whether a Congress which can legislate on only national matters should have its membership based on the district system. Such a system fails to give a national point of view.

There are at least four possible solutions of this problem: (1) the district system with the representatives coming from the district; (2) the district system with the representative coming from any portion of the state; (3) all representatives of a state elected at large; (4) half of the representatives elected at large and the other half from large districts in case the state has ten or more representatives. Possibly the last suggestion would come nearest meeting our requirements.

The term of office for a representative is two years with indefinite reeligibility. One of the objections urged against the ratification of the Constitution was the long term of office of Representatives. The term of representatives in Great Britain, France, Germany, and Canada is five years. Fortunately the two-year term for American Representatives, while it results in a dissolution of the House every two years, does not cause a radical change in its personnel. As an average about one-fourth of the membership



of the House is changed by an election.<sup>14</sup> It is not uncommon for a Representative to remain in the House for twenty or thirty years, and in some instances forty. In practice, therefore, a continuity of the membership of the House is maintained that tends to retain its more able and experienced members.

Representatives were paid a per diem until 1855, when they were placed on a salary basis of \$3,000 a year. This was increased in 1865 to \$5,000, in 1907 to \$7,500, and in 1925 to \$10,000.<sup>15</sup> For each regular session, they are allowed twenty cents a mile for a round trip over the most direct route. This is sufficient to care for the fares of five persons. Each member is given \$1,500 for clerk hire, which is frequently used for a member of the family.

#### IV. THE ELECTION OF REPRESENTATIVES

1. *Popular Vote.* There were three methods proposed in the Federal Convention for the election of representatives. It was suggested that they be elected (1) by the state legislatures,<sup>16</sup> (2) by whatever plan the legislature should direct,<sup>17</sup> and (3) by popular vote.<sup>18</sup> The weight of opinion in the Convention was in favor of popular election for the following reasons: (1) since the government was to operate on individuals, they should be represented; (2) differences in classes of society, in interests, and in habits could be represented by a district system based on popular government; (3) election by legislatures would emphasize their importance and tend to make the general government the agent of the states; (4) republican government can subsist only on the confidence of the people and to secure this their participation must be provided. Madison thought "that the great fabric to be raised would be more stable and durable, if it should rest on the solid foundation of the people themselves, than if it should stand merely on the pillars of the legislatures."<sup>19</sup>

2. *State Suffrage.* The House is based on a state suffrage. The Constitution requires that "the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislature."<sup>20</sup> It thus happens that while the

<sup>14</sup> Robert Luce, *Congress* (1926), 7.

<sup>15</sup> Act of March 4, 1925, c. 549, 4 (43 Stat. 1301).

<sup>16</sup> Farrand, *The Records of the Federal Convention*, I, 28, 57, 353, 360.

<sup>17</sup> *Ibid.*, I, 364-365.

<sup>18</sup> *Ibid.*, I, 20, 54, 60, 225, 235, 353, 360.

<sup>19</sup> Hunt and Scott, *The Debates of the Federal Convention of 1787*, 33.

<sup>20</sup> Art. I, Sec. 2.

right to vote for Representatives is a constitutional right, the states determine in whom this right inheres, subject to the limitations of the Fourteenth, Fifteenth, and Nineteenth Amendments.<sup>21</sup> Suffrage is not an incident of citizenship of the United States.<sup>22</sup> "All regulations of the elective franchise, however, must be reasonable, uniform and impartial; they must not have for their purpose directly or indirectly to deny or abridge the constitutional right of citizens to vote, or unnecessarily to impede its exercise; if they do, they must be declared void."<sup>23</sup> The requirements of property or educational qualifications, registration, presence at the polls, or the observance of regulations to insure fairness or to prevent fraud are regarded as only necessary preliminaries to the proper exercise of the suffrage and are, therefore, constitutionally within the power of the states to impose.<sup>24</sup>

3. *Federal Control.* While the Constitution reserves to the states the power to prescribe the time, place, and manner of holding elections for Representatives, it grants Congress the authority to make or alter such regulations at its discretion.<sup>25</sup> Congress has sufficient authority to assume complete and exclusive control of the election of Representatives and to provide a separate process and machinery for their election, if in its opinion the state process offers inadequate protection.

It was not until 1842 that Congress saw fit to enact regulations concerning the election of Representatives by a general ticket, which gave the entire representation of such states to the majority party. To correct this practice, the Act of 1842 provided that each Representative should be elected from a separate district composed of contiguous territory.<sup>26</sup> In 1873, Congress provided that elections of Representatives should be held on the same day in all the states, beginning Tuesday after the first Monday in November, 1876, and following on the same day every second year thereafter.<sup>27</sup> In 1899, Congress amended the Act of 1872, providing that all votes for Representatives in Congress must be by written or printed ballot

<sup>21</sup> *Ex parte Yarbrough* (1884), 110 U. S. 651.

<sup>22</sup> *Minor v. Happersett* (1874), 21 Wallace 162.

<sup>23</sup> Cooley, *Constitutional Limitations*, II, 1370.

<sup>24</sup> See Robert C. Brooks, *Political Parties and Electoral Problems*, 378-

379.

<sup>25</sup> Art. I, Sec. 4.

<sup>26</sup> 5 *Stat. at L.*, 491.

<sup>27</sup> The act of March 3, 1875, exempted from the application of this act those states which had changed the day of election or whose constitutions would have to be amended to effect a change in the election of state officers. Maine, Vermont, and Oregon hold their elections under this exemption.

or voting machine, the use of which has been duly authorized by state law; and all votes "received or recorded contrary to this section shall be of no effect." It has been held that Congress has the power to control state officials in the execution of state election laws if national officials are being elected.<sup>28</sup>

Nominations of candidates for membership in the House are regulated by state laws. Formerly they were made by caucuses and conventions, but in most cases the direct primary is employed at the present time. A few states still employ the convention system. By the latter method, there is held in the congressional district a nominating convention composed of delegates from the counties, towns, or other subdivisions of which the district is composed. These delegates are generally selected by county conventions.

4. *Contested Elections.* Election contests over seats in the House are under its control and there is no appeal from its decision. In giving the House of Representatives control of this matter, the framers of the Constitution were following the practice of the House of Commons in Great Britain, which body in 1868 placed election disputes under the jurisdiction of the courts. Election disputes are settled by judicial process also in Germany. This would seem to be the better method for several reasons. Election contests are primarily a matter of evidence and law, of which courts are a better judge. Courts are less subject to political influence. Frequently such disputes are raised because of the prospects of using political influence in their settlement. Again their settlement consumes the time of the House which is needed for legislative purposes.<sup>29</sup>

The House maintains three standing committees, to one of which such disputes are referred after the Clerk of the House has proposed the case. If a candidate does not acknowledge defeat, he may ask for a recount of the votes according to the state election laws, and if satisfaction is not obtained, he may bring his case before the House by notifying the apparently successful candidate of the contest and the grounds on which it is based. After formal reply to this notification has been received the papers are turned over to the Clerk, who prepares the case and secures its reference to the proper committee. The case is then argued before the committee by the two contestants, with the introduction of other

<sup>28</sup> *Ex parte Siebold* (1879), 100 U. S. 371; *Ex parte Clarke* (1879), 100 U. S. 399; *Ex parte Yarbrough* (1884), 110 U. S. 651.

<sup>29</sup> To transfer election disputes from the House to the Federal Courts would require a constitutional amendment.

evidence if necessary, and a report is made to the House in favor of one of the disputants. The House usually accepts this report.

## V. DISCIPLINE AND VACANCIES

The House may refuse a seat to a member-elect or deprive a disqualified member of a seat by a majority vote, but it requires a two-thirds vote to expel.<sup>30</sup> A seat may be lost for lack of qualifications, while expulsion is based on misconduct. The grounds for expulsion are not stated in the Constitution, and are, therefore, a matter within the discretion of the House. Expulsion has taken place for treason against the United States and for sympathy with rebellion.

The House also has the power to punish its members for disorderly conduct.<sup>31</sup> It can inflict penalties on its members for violation of its rules relating to the attendance of absent members. "We see no reason," said Justice Miller, "to doubt that this punishment may in a proper case be imprisonment, and that it may be for refusal to obey some rule on that subject made by the House for the preservation of order."<sup>32</sup>

When vacancies caused by death, resignation, expulsion, or acceptance of a disqualifying office, or removal from the state, occur in the representation of a state, its executive authority is required by the Constitution to issue writs of election to fill such vacancies.<sup>33</sup> In case the state authorities should refuse to provide for the regular election of Representatives or for the filling of vacancies Congress has power to establish election machinery for this purpose. Commenting on the intention of the framers of the Constitution in granting Congress power over the election of Representatives, Justice Field said: "The act was designed simply to give to the Federal Government the means of its preservation against a possible dissolution from the hostility of the States to the election of Representatives, or from their neglect to provide suitable means for holding such elections."<sup>34</sup> This view is in line with Madison's remarks on this subject in the Convention.<sup>35</sup> Hamilton, in discussing the same subject, said that "every government ought to contain in itself the means of its own preservation."<sup>36</sup>

<sup>30</sup> *The Constitution*, Art. I, Sec. 5.

<sup>31</sup> *Anderson v. Dunn*, (1821), 6 Wheaton 205.

<sup>32</sup> *Kilbourn v. Thompson*, (1880), 103 U. S. 168, 189.

<sup>33</sup> Art. I, Sec. 2.

<sup>34</sup> *Ex parte Siebold* (1879), 100 U. S. 371.

<sup>35</sup> Hunt and Scott, *op. cit.*, 371.

<sup>36</sup> *The Federalist*, No. LIX (Lodge Ed., 368).



## VI. THE ORGANIZATION OF THE HOUSE

The expiration of term of office of Representatives completely dissolves the House. Technically, there are no rules, no officers, and no membership. By long usage, the Clerk of the previous House has been permitted to hold office until his successor is elected and qualified. He therefore presides until a Speaker of the House is elected, during which time he exercises the power of recognition and decides questions of order.

1. *The Roll of Members-Elect.* Prior to the meeting of the newly elected House, the Clerk compiles the roll of its membership from the credentials which he has received from state officials.<sup>37</sup> If a seat is claimed by more than one person it is assigned to the holder of a properly signed credential until the House is organized and ready to assume jurisdiction of the matter itself.<sup>38</sup>

At high noon on the first Monday in December the Clerk of the previous House calls the newly elected House to order and proceeds to call the roll of the members-elect by states alphabetically. He then administers the oath of office to the members as a body except those whose qualifications have been questioned. They are not permitted to take the oath until their right to membership has been decided by the House.<sup>39</sup> If a quorum is present, the Clerk announces that the first order of business is the election of a Speaker of the House.

2. *The Election of the Officers of the House.* The election of a Speaker is usually a matter of a few minutes because the majority party has already selected its candidate in caucus. The minority party also has a candidate similarly selected. Both of these candidates are nominated on the floor of the House and a formal election takes place, thus satisfying the constitutional requirements of the election of the Speaker by the House.<sup>40</sup> The House votes orally

<sup>37</sup> In most cases credentials are sent to the Clerk of the House by the Governors of the states.

<sup>38</sup> The House assumes that the member holding the credential is elected and permits him to act as a regular member and draw his salary for the time he serves. If finally the other contestant is declared elected, he draws a salary for the entire term of two years. In 1903 a contest from the twelfth district of Missouri resulted in payment of \$10,000 as the regular salary to the duly elected member who served one day and about \$10,000 to the member who was unseated. Each contestant was paid \$2,000 twice for expenses involved in the contest. Hart and McLaughlin, *Cyclopedia of American Government* (1914), I, 656.

<sup>39</sup> On the completion of the roll of members-elect, see De Alva Stanwood Alexander, *History and Procedure of the House of Representatives* (1916), 12-25, and Hinds' *Precedents of the House of Representatives*, I, 11-49.

<sup>40</sup> *The Constitution*, Art. I, Sec. 2.

in the selection of a Speaker. The candidate of the minority party for the speakership has in recent years become its floor leader.

The other officers of the House, the Clerk, Sergeant-at-Arms, the Doorkeeper, the Postman, and Chaplain, are chosen in accordance with a resolution of the caucus of the majority party. The Clerk of the House is next in importance to the Speaker. He must keep an accurate record of the proceedings of the House, which the Constitution requires to be published from time to time. He is the presiding officer of the House during the election of a Speaker; affixes its seal to all warrants, writs, and subpoenas issued under its orders; certifies to the passage of all its bills and joint resolutions; keeps the accounts of its contingent and stationary funds; and pays its members, officers, and employees on the first of every month according to law.<sup>41</sup> He is assisted by thirty or more subordinates in various capacities, all of whom he appoints, thus giving his party considerable patronage.<sup>42</sup>

The Sergeant-at-Arms compiles the roll of members-elect and presides over a new House during the election of a Speaker in case of absence of the Clerk. He maintains the order of the House under the direction of the Speaker and executes his orders. He keeps the accounts for the pay and mileage of members, and is assisted by a half-dozen subordinates.

The Doorkeeper enforces the rules of admission to the House and has custody of its furniture, books, property, and apartments, supervises the janitor service, and compiles the roll of members-elect in case the Clerk and Sergeant-at-Arms are unable to perform this service. He has a staff of seventy or more subordinates. The Postmaster superintends the post office of the Capitol and House Office Building maintained for the accommodation of its members and officers and sees that their mail is promptly and safely delivered. He has a score or more of subordinates to assist him in the performance of his duties. The Chaplain is required to open each day's session with prayer.

(3) *The Adoption of Rules of Procedure.* Before the House can proceed to business after the election of officers, it must adopt the rules by which it proposes to be guided in its next session. Ordinarily this is a rather perfunctory performance and is generally accomplished by some older member of the majority party proposing the adoption of the rules of the preceding House. However, if changes in the rules are desired, this is the time to propose

<sup>41</sup> See Rule III, *House Manual and Digest*.

<sup>42</sup> For a list of his staff, see *Congressional Directory* (January, 1928), 255.

them. When the rules are once approved by the majority party, it is very difficult to change them.

The House works by the *House Manual and Digest*, a handsome volume of more than six hundred pages. This great guide of legislative procedure is based on parliamentary law in general, the rules of the English House of Commons, and Jefferson's Manual, which he proposed for the United States Senate when he was its presiding officer. Like any other code of procedural law, it has become so highly technical that it requires years of study and experience to become a successful manipulator of its provisions. The result is that the older members who have acquired a degree of efficiency in this art resist the making of changes in the rules.

(4) *The Speaker of the House.* (a) *His Duties.* As chairman of the House, he performs those duties which parliamentary law customarily confers on such officials.<sup>43</sup> He opens and closes its sessions; maintains order and decorum; decides controversial points of procedure; represents the House in its collective capacity; signs its acts, addresses, joint resolutions, writs, warrants, and subpoenas; announces the order of business; puts questions before the House; and announces the vote.

The Speaker is not required by the Constitution to be a member of the House, but the unwritten constitution has added this requirement. As a member of the House, he retains his right to vote in ordinary legislative proceedings, yet he is not required to vote except when his vote would be decisive or when the House votes by ballot. His name is not on the roll from which the yeas and nays are called, and is not called except by request and then at the end of the roll.<sup>44</sup> In all cases of a tie vote the question is considered lost.

(b) *Chief Sources of His Power.* (a) Reference of Bills. The Speaker enjoys only a very limited power in the reference of public bills. While in theory he retains the power of referring bills, it has practically been made ministerial in character and is primarily exercised by the Clerk. If doubt arises in the case of a public bill as to what committee should consider it, the Speaker decides the matter. If he is interested in the fate of the bill, he may be able to refer it to a friendly or unfriendly committee and thus largely control the success or failure of the measure.<sup>45</sup>

<sup>43</sup> See Rule I, *The Manual of the House*.

<sup>44</sup> Alexander, *op. cit.*, 53.

<sup>45</sup> Chang-Wei Chiu, *The Speaker of the House of Representatives Since 1896* (1928), 109-111.

(b) Recognition. No motion or speech can be made by any member of the House until he is duly recognized by the Speaker. While there are certain unwritten laws and restrictions imposed by custom on the power of recognition, he can largely follow his own pleasure in this matter. The Speaker is a partisan and is the agent of the caucus of the majority party rather than of the House. His recognition policy is, therefore, dictated by the caucus in the interest of its party. It is obvious how this power can be used to control largely the course of debate and consequently legislation. The Speaker's pleasure finally becomes the will of the leaders of his party. In fact, since the revolution of 1910,<sup>46</sup> when the character of the speakership was considerably changed, he has ceased to be Speaker in his own name and has become the agent of the caucus of his party.<sup>47</sup>

(c) Decision of Points of Order. While it is possible for a decision on a point of order to control the action of the House at times and to have a far-reaching influence on matters of policy, this power is especially useful to the majority party to control the filibustering tactics of the minority. These tactics usually take the form of dilatory motions for recess or for adjournment to a set day. An older method of filibustering was to prevent a quorum by refusing to vote. Speaker Reed ruled that a quorum depended on presence rather than voting and inaugurated the practice of counting as present those who were in their seats regardless of whether they answered to the roll call, and of disregarding all motions or appeals made for the purpose of obstructing the proceedings of the House. This practice is now regularly followed by the Speaker, with the effect that the House is practically under the complete control of the majority party.

The American Speaker, unlike the English Speaker, is a partisan and votes as a member of the House if he chooses to do so, thus representing his constituency as any other member. He more nearly resembles in his functions the President of the French Chamber of Deputies than the English Speaker. In final analysis, he is the chief agent of the caucus of the majority party in the House in the achievement of its program of legislation, using at all times his powers in its behalf.

(5) *The House Committee System.* (a) *The Rules Committee.* This committee is another very strong agent in controlling the work

<sup>46</sup> For an account of the "Revolution of 1910," see George Rothwell Brown, *The Leadership of Congress* (1922), 143-171.

<sup>47</sup> Chiu, *op. cit.*, 165-196.



of the House. It decides the order in which bills may be considered, the length of debate, and the time of voting. This is done by reporting a rule which will accomplish its purpose. A report by this committee takes precedence over any other business of the House except a report of the conference committee or a vote to go into the committee of the whole and is invariably adopted since it represents primarily the majority party. It can practically make or kill bills by giving them favorable or unfavorable positions in the order of consideration, by permitting, limiting, or refusing debate, and by admitting or refusing amendments. It may, therefore, on occasion become a miniature House.

Prior to 1910, the Speaker was chairman of this committee and appointed its other members—two from each party, thus retaining control in his own hands. Part of the revolution of 1910 was to exclude him from the committee and to make its members elected by the House. This committee now consists of twelve members, eight of the majority party and four of the minority, who are selected in caucuses of the parties. It, however, exercises the same powers and practices the same methods as has been its custom since it became an agent of imperial control by the majority party.

(b) *Legislative Committees.* The Legislative committees of the House are composed of majority and minority groups representing the majority and minority parties. The majority party has a majority in each committee, in order to give it control of the committee and the proceedings of the House.

The Republican members of these committees are nominated by a committee composed of a representative from each state having Republican members in the House. This member is selected by the state delegation of his state, and, in the selection of the Republican committeemen, he has as many votes as there are Republican members in the House from his state.<sup>48</sup> The Democratic members of the House committees are selected by the Democratic members of the Ways and Means Committee, who are selected by the Democratic caucus. These two nominating committees, one for each party, nominate to the House their respective *pro rata* membership for each committee, and then the House elects these nominees perfunctorily.

These two committees on committees, in selecting the members from their respective parties to nominate for committee places, are primarily governed by the rule of seniority. That is, length

<sup>48</sup> Brown, *op. cit.*, 193.

of service in the House determines committee appointments, assuming, of course, that they have been regular in their politics. The chairmanship of each committee automatically goes to the senior member of its majority group; the minority group is directed by its ranking member.

The contest for important committee places creates such party factionalism that this more or less routine method of committee appointments has been adopted in the interest of party unity. It gives sufficient permanence to a committee to enable its members to become familiar with the subject matter which is entrusted to them. This has a tendency to create a committee of experts and thus to prevent a single member from dominating the entire committee. A layman made into a sort of specialist by acquiring accurate information through years of service is possibly the most efficient legislator that the representative system can produce.<sup>49</sup> Of course, the rule of seniority makes chairmen of men who possibly should not be members on any committee and who will largely control its action by the sheer force of their ideas. It also excludes capable young members from important places on committees. It is based on the law of averages, and, while it is not without its serious defects, it possibly secures as good results as a system ostensibly based on merit but actually controlled by political chicanery. Most of its abuses were found under the old system of appointment by the Speaker.

The House (1929) has forty-six standing committees, about two-thirds of which really function; however, less than a third of the committees do nine-tenths of the work. From very simple beginnings the committee system of the House has come to be a labyrinth of tremendous proportions and interest. The increase of membership in the House, the growth of the functions of the government, the tendency toward greater supervision by committees of the activities of the government, the desire to have as many chairmanships of committees as possible because of the patronage connected with them, and the absence of a central legislative agent of the cabinet type are mainly responsible for this development.

The more important committees are those dealing with ways and means or the raising of revenues, appropriations or the expenditure of revenues, rivers and harbors, interstate and foreign commerce, banking and currency, post offices and post roads, naval affairs, military affairs, immigration, agriculture, the judiciary, and

<sup>49</sup> See Luce, *op. cit.*, 3-7.

rules.<sup>50</sup> The committees range in size from two to thirty-five members, but no member is permitted to serve on more than three standing committees, and, in most instances, a member is assigned to only one or two committees.<sup>51</sup> The control of the legislative process requires that the party in power have a majority on each committee, which usually ranges from three to eleven members in the larger and more important committees.

(6) *The Committee System of the Invisible Government.* It is a well recognized fact that the Speaker of the House and its official committees are the subagents of an unofficial or extra-legal organization known as the Invisible Government of the House in which actual control exists.<sup>52</sup> This organization is restricted to the membership of the majority party and its cabinet is the caucus.

This caucus is the secret meeting of the leaders and members of the party in power. Its proceedings are not only executive in character but are binding upon those who participate. It determines the policy of its party in the House and frequently the details of legislative measures, selects the Speaker and the committee members of its party, makes the rules of its procedure, and creates a set of agents to see that its will is followed in these matters.

The committee on committees is its agent for the selection of the members of its party on the various committees. The floor leader of the majority party, another one of its agents, is chairman of this committee. It is the business of this committee to recommend for committee appointments those members of its party who have rendered long and faithful service and who are thoroughly in sympathy with its program of legislation. It may also punish recalcitrant members who have displayed an independent spirit in politics by refusing to recommend them for important committee places. It must know the idiosyncrasies and the peculiarities of mind and temperament of every member in order to place round pegs in round holes and square pegs in square holes. For instance, in proposing members of the Ways and Means Committee, it must see that the sugar, lumber, mining, manufacturing, and banking interests are properly represented, and, therefore, include only such

<sup>50</sup> The list of the committees for the House and the assignment of members may be found in *Congressional Directory*, 70th Congress, 1st session (1928), 214-243.

<sup>51</sup> The present practice is to assign a member to only one of the ten or more major committees.

<sup>52</sup> See Brown, *op. cit.* vol. 2, 4.

members as reflect the attitude of the party on these matters.<sup>53</sup> Thus the committee system becomes the agent of the House machine.

The Steering Committee, composed exclusively of members of the majority party chosen from the geographical strongholds of the party and selected by majority vote in the caucus, is another strong agent of the invisible machine of the House. The Floor Leader who is chairman of the committee on committees is also chairman of this committee, which is composed of seven members. This committee is subject to the call of the chairman, but usually meets every morning. Its work is so burdensome that the chairmen of important committees are excluded from its membership. This committee is probably the strongest agent of the caucus. It is the general manager of the House. It is the harmonizing agent of the majority party. It calls legislative committees before it, revises their bills in the interest of party harmony, suggests rules to the Rules Committee and in general controls the character of the program of the House, its calendars, and procedure.

There are by way of summary three organizations that have to do with the workings of the House: (1) its official organization, consisting of the Speaker, the Rules Committee, and the legislative committees—all of which are under the control of the majority party; (2) the organization of the majority party composed of its caucus, floor leader, committee on committees, and the Steering Committee; and (3) the organization of the minority party, consisting of its caucus, floor leader, and members on the ways and means committee, who are its committee on committees.<sup>54</sup>

## VI. RIGHTS, PRIVILEGES, AND DISABILITIES OF MEMBERS

The members of the House are free from arrest during their attendance upon its sessions and in going to and from the same except in cases of "treason, felony, and breach of the peace."<sup>55</sup> This provision is effective immediately after election<sup>56</sup> before the convening of the House and for a reasonable time after its adjournment. "Treason, felony, and breach of the peace" have been construed to cover all criminal offenses,<sup>57</sup> and in fact considerable immunity from service in civil suits is also enjoyed by law, al-

<sup>53</sup> See W. B. Munro, *The Invisible Government* (1928), 113-135.

<sup>54</sup> See Paul DeWitt Hasbrouck, *Party Government in the House of Representatives* (1927), 26-165.

<sup>55</sup> *The Constitution*, Art. I, Sec. 6.

<sup>56</sup> Charles K. Burdick, *The Law of the American Constitution*, 175.

<sup>57</sup> *Williamson v. United States* (1908), 207 U. S. 425.



though it is pretty clear that the Constitution does not provide for this protection.

Freedom of speech in legislative assemblies is generally considered one of the basic principles of free government. It has been wisely considered by our courts that this privilege should be liberally interpreted.<sup>58</sup> It applies to proceedings on the floor of the House or in committee rooms and covers reports, resolutions, and debates. This protection applies only so long as it is exercised within the scope of public duty, or in the furtherance of public rights or public policy. A matter may be privileged on the floor of the House that would not be so recognized for publication. "No man," said Story, "ought to have a right to defame others under color of a performance of the duties of his office. And if he does so in the actual discharge of his duties in Congress, that furnishes no reason why he should be enabled through the medium of the press to destroy the reputation and invade the repose of other citizens."<sup>59</sup>

Members of the House are also privileged to send through the mails unlimited quantities of printed matter stamped with their name. This privilege is known as the "frank." It is by this means that members are enabled to make known their views on public questions, since the House is no longer primarily a deliberative body and since the press pays little attention to what is said on the floor. This privilege is abused, but it is a result of a combination of unfortunate circumstances which it seems impossible to correct. Constituents are entitled to know the position of their representatives on the issues of the day, but the procedure of the House and the attitude of the Press make no provision for this type of education.

Representatives cannot hold any civil office under the United States during their term of office nor be subsequently appointed to any office which was created or the salary of which was raised during their terms.<sup>60</sup> They have lost their seats for having accepted commissions as officers in the military forces of the nation. It has been held, however, that they may be trustees of educational institutions or directors of public federal institutions appointed by law.<sup>61</sup>

<sup>58</sup> *Kilbourn v. Thompson* (1880), 103 U. S. 168.

<sup>59</sup> Joseph Story, *Commentaries on the Constitution of the United States* (Abridged Ed., 1883), 309.

<sup>60</sup> *The Constitution*, Art. I, Sec. 6.

<sup>61</sup> *United States v. Hartwell* (1867), 6 Wallace 385. See also *House Report* 2005, 55th Cong., 3d Sess.

## VII. SPECIAL POWERS OF THE HOUSE

1. *Impeachment.* The House enjoys the sole power of impeachment.<sup>62</sup> The grounds for impeachment are treason against the United States, bribery, other high crimes, and misdemeanors. Acts of official misconduct, or failure to perform official duties, or acts outside of official circles which clearly evidence an unfitness for office are apparently sufficient to warrant impeachment proceedings. "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort."<sup>63</sup> Bribery is self-explanatory. The House itself is the judge of what constitutes "high crimes and misdemeanors."

The President, Vice-President, and all civil officers of the United States are subject to impeachment. The officers of the army and navy, not being civil officers, are, therefore, not subject to impeachment nor are members of Congress impeachable. The latter are not considered officers of the government since they are not appointed by the President.<sup>64</sup>

"In the House impeachment proceedings," says Alexander, "are set in motion by petition, memorial, a letter of complaint, or upon an oral or written statement of a member."<sup>65</sup> The complaint is then referred to the Judiciary Committee, which, if it thinks the matter sufficiently serious, may appoint a sub-committee to investigate, with the power to compel the attendance of witnesses and the production of papers. The person accused may appear in person or by counsel. If he appears in person, he is not obliged to answer all questions or present proof. The rules of evidence are generally observed unless the accused requests a greater latitude.

If the House, on the basis of the report of the Judiciary Committee sees fit to indict the accused, it appoints two of its members to notify the Senate of its action and a committee to draft the articles of impeachment. After their adoption, it appoints five or more members by ballot or by appointment of the Speaker as managers of the impeachment proceedings before the Senate. If the House attends the trial of the accused, it does so as a committee of the whole. The House in impeachment proceedings acts as both a grand jury and a prosecuting attorney.

<sup>62</sup> *The Constitution*, Art. I, Sec. 2.

<sup>63</sup> *Ibid.*, Art. III, Sec. 3.

<sup>64</sup> D. Y. Thomas, "The Law of Impeachment in the United States,"  
2 *Am. Pol. Sci. Rev.*, 378, 386.

<sup>65</sup> Alexander, *op. cit.*, 332.

2. *The Election of the President.* The Constitution wisely provides for the election of a President in case no candidate receives the constitutional majority of the electoral votes. This responsibility has fallen upon the House twice in our history. In 1800, Jefferson and Burr each received 73 electoral votes. The House, after thirty-six ballots, voting by states, elected Jefferson February 17, 1801. In 1824, the electoral colleges again failed to elect and the House, February 9, 1825, chose John Quincy Adams by a vote of 13 of the 24 states represented. In 1877 an effort was made to induce one of the Republican electors to vote for Tilden, thereby producing a tie and throwing the election into the House, in which event Tilden would have been elected instead of Hayes.<sup>66</sup> Some of the framers of the Constitution thought the power of electing the President would be one of the chief functions of the House. "It would not perhaps be rash to predict," said Hamilton, "that as a means of influence it will be found to outweigh all the peculiar attributes of the Senate."<sup>67</sup> Mason said in the Federal Convention that the House would elect the President nineteen times out of twenty and in the Virginia Convention he raised his figures to forty-nine out of fifty.<sup>68</sup>

In choosing a President, the House is restricted to the three highest on the list of those voted for as President by the electoral colleges. The votes are taken by states, each state having one vote which is determined by a caucus of the representatives of each state in the case of those states having two or more representatives. Of course, the vote of each state would be controlled by the party having the majority of its representatives. In case of an equal division among the representatives of any state, no vote would be cast. In exercising this electoral function, the Constitution requires the House to have a quorum consisting of one or more representatives from two-thirds of the states and a majority of all the states is necessary for the election.

3. *The Origination of Revenue Bills.* The Constitution requires that all revenue bills originate in the House of Representatives but grants the Senate power to amend such bills. The effect of the latter provision has been to give our Senate the strongest position in financial matters of any upper house in the world when undoubtedly the Founding Fathers intended to establish the primacy

<sup>66</sup> Stanwood, *A History of the Presidency*, I, 381.

<sup>67</sup> *The Federalist*, No. LXVI (Lodge Ed.)

<sup>68</sup> Max Farrand, *The Framing of the Constitution of the United States*, 166.

of the House in these matters in line with the principle on which modern governments generally work. In fact, the Senate sometimes practically writes a new revenue bill and through the conference committee is usually able to force the House to agree approximately to its contentions. The primacy of the House under the written Constitution has been converted into a supremacy of the Senate under the unwritten constitution.

It cannot, therefore, be maintained that the House derives any particular strength from its special powers. Impeachment is not an effective agent of control and is being superseded by public opinion.<sup>69</sup> In only three instances of nine cases of impeachment by the House has the Senate convicted. The House has rarely exercised the power of electing the President and if our party system should change so as to increase this function, it is likely that the Constitution would be amended to care for such a change. Anyway, the House has no means of controlling the President after it elects him. It has lost to the Senate its ascendancy over finance, which was its greatest power.

#### VIII. CAUSES OF THE DECLINE OF THE PRESTIGE OF THE HOUSE

1. *The growth of membership of the House* is possibly the greatest factor in this change. It is responsible for the ineffectiveness of the House as a deliberative assembly, and the consequent lack of publicity of its proceedings. It is practically no longer an agent in the formation of public opinion because nobody knows what it is saying or doing. The individual member is crushed in the mass. "With a minimum number of one from each State and slightly more from the large States," says Professor Young, "the House could be cut down to a body of 150, a change that would restore to it much of its former importance and prestige."<sup>70</sup> This would call for a larger caliber of Representative and enable him to speak for a larger and more powerful constituency. The House could again become a deliberative body and proceed in the open.

2. *The autocratic control of the House* converts it into an agent of a partisan clique. The clique determines its policies and its votes. Instead of representing the country, it represents whomever and whatever the clique is sponsoring. The member who refuses to take courteously the dictation of the dominant group is helpless.

<sup>69</sup> See C. S. Potts, "Impeachment as a Remedy," 12 *St. Louis Law Rev.*, No. 1.

<sup>70</sup> *Op. cit.*, 89.



Everything of importance takes place in secret. The proceedings of the House are almost entirely perfunctory and are not even interesting to members themselves.

3. *The decline in the power of the House* is emphasized by the fact that the Senate and President have become more powerful. While the special powers of the House have become relatively unimportant, those of the Senate have become vastly more important. The President has become the strongest executive in the world. The decline of the House combined with an increase in prestige and influence of the Senate and President tends to emphasize its relatively inferior position in the general scheme of things.

## CHAPTER XX

### THE UNITED STATES SENATE

#### I. ITS ESTABLISHMENT

The United States Senate is essentially an expression of the Anglo-Saxon struggle for local self-government. It is in this respect that it appeals to people of British descent and for this reason that the Canadian, Australian, and South African Senates are but modified copies of it. It is itself only a modified form of the Congress under the Articles of Confederation in which the states as political entities were represented on an equal suffrage basis. The struggle of the colonies before the Revolution was for local autonomy or Dominion status within the British Empire; it was natural and logical for the colonies after becoming states to make provision in their confederation for the status they had demanded of the mother country. After having done this, "a more perfect union" in 1787 was probably impossible except on the condition that the states as such be given a definite place in the structure of the general government. The Senate is, therefore, the expression and survival of this background which was too strong to be overcome by the nationalistic forces in the Convention of 1787, in which by the Connecticut compromise previously noticed it was agreed that there should be a Senate representing a union of states and a House representing a union of the people.

The Senate in functions is closely akin to the governor's council of colonial days. "The United States Senate," said an eminent authority, "is . . . a gradual development from the governor's council of colonial times which was first a mere advisory council of the governor, afterwards a part of the legislature sitting with the assembly, then a second house of the legislature sitting apart from the assembly, as an upper house; sometimes appointed by the governor, sometimes elected by the people, until it gradually became an elective body, with the idea that its numbers represented certain districts of land, usually the counties. It had developed thus far when the National Constitution was framed, and it was adopted

in that instrument so as to equalize the States and prevent the larger ones from oppressing the smaller ones.”<sup>1</sup>

## II. ITS PURPOSE

The Senate more than any other feature of the general government was to the Founding Fathers an expression of their political philosophy, which embraced primarily the ideas of state sovereignty, aristocracy, and conservatism. State sovereignty is one of the most fundamental ideas in American political experience. It is the counter force to the movement of centralization which has also been a constant tendency in American life since almost the founding of the American colonies. The teaching of history in 1787 clearly indicated that the latter tendency generally triumphed in its struggle with individualism. There were so many fundamental elements of uniformity in American life in 1787 such as a common political experience, an approach to a social and economic equality not found anywhere else, a dominating protestantism, a common jurisprudence, a growing cultural unity based on a common language and literature, a commerce assuming national proportions, a growing population, and a strong admiration for British political institutions which were of the unitary type that there was every reason for believing that centralization would develop very rapidly in the United States. There was apparently but one method that could be used to give a different course to our political development and this was to guarantee to the states their political and territorial integrity subject to change only by their consent or by revolution.

It is generally conceded by the well-informed that the Founding Fathers were aristocratic in their political philosophy. “The people,” said Roger Sherman in the Convention of 1787, “immediately should have as little to do as may be about the Government.”<sup>2</sup> “The federal government,” said Woodrow Wilson, “was not by intention a democratic government. In plan and structure it had been meant to check the sweep and power of popular majorities. . . . The government had, in fact, been originated and organized upon the initiative and primarily in the interest of the mercantile and wealthy classes.”<sup>3</sup> Since the Senate was not to be

<sup>1</sup> Sidney George Fisher, *The Evolution of the Constitution of the United States* (1909), 18.

<sup>2</sup> Hunt and Scott, *Debates in the Federal Convention of 1787*, 31-32.

<sup>3</sup> *Division and Reunion* (1902), 12.

elected by the people nor to be representative of them, the forefathers felt that it would be a very effective check upon democracy.

They also had good reasons for believing that the Senate would be an exponent of conservatism. Its election by legislatures which were themselves elected by a restricted suffrage and the higher age requirements for Senators than for Representatives would mean that its members would likely be wealthy men and powerful figures in state politics. To guarantee this result, it was suggested in the Convention of 1787 that Senators serve without pay.<sup>4</sup> This arrangement, they thought, would realize their ideal of government by "the rich and well born." Their expectations have largely been realized. More than half of the Senators are above sixty years of age. They generally enjoy the confidence of the financial and commercial interests of their states.<sup>5</sup>

### III. THE QUALIFICATIONS OF ITS MEMBERS

The Constitution requires that a Senator must be at least thirty years of age and an inhabitant of the state from which he is chosen, and must have been nine years a citizen of the United States. The age requirement was adopted in the Convention of 1787 without debate. The period required for citizenship was a matter of considerable debate, four, ten, and fourteen years being suggested and nine being adopted only by compromise.<sup>6</sup> Attempts were made to require property and financial qualifications but these failed. The states cannot change the constitutional qualifications for Senators.

The Senate, like the House, is the judge of the qualifications of its members and may seat a member without questioning his qualifications. Henry Clay was seated before he was thirty years of age. The citizenship requirement of nine years prevented Albert Gallatin from occupying a seat to which he was elected in 1793. The Senate may punish its members for disorderly conduct by reprimand or suspension and may expel by a two-thirds vote. It can withhold membership by a simple majority. Of course, a Senator-elect must take an oath to support the Constitution of the United States before taking his seat, and anyone who has taken this oath and later engages in insurrection or rebellion against the United

<sup>4</sup> Max Farrand, *The Records of the Federal Convention*, I, 219.

<sup>5</sup> A recent count showed that one-half were sixty or above and that seventeen were over seventy. James F. Young, *The New American Government and Its Work*, 107.

<sup>6</sup> Farrand, *op. cit.*, II, 121-126, 141, 155, 228, 235-239, 266, 272.



States is by the Fourteenth Amendment disqualified.<sup>7</sup> A Senator cannot hold a federal office.

#### IV. THEIR ELECTION, COMPENSATION, AND ~~TERM~~ OF OFFICE

Four proposals were made in the Convention of 1787 for the election of Senators:<sup>8</sup> (1) by the state legislatures; (2) by the people; (3) by the House of Representatives from persons nominated by the state legislatures; and (4) by appointment of the President from a list nominated by the state legislatures.

The Constitution originally provided that Senators should be elected by the legislatures of the states but did not say whether the two houses should vote separately or conjointly in the performance of this function. The result was that the legislatures frequently became deadlocked over this matter and before agreement could be reached wasted considerable time which should have been devoted to state legislation. Hence Congress by Act of 1866 provided that the houses of the legislatures should vote separately, but in the event of no election by the second Tuesday of the legislative session, they should assemble as one body and elect by majority vote.

This method of election became increasingly unsatisfactory. The practice of electing members to the state legislatures on the basis of their attitude toward the candidates for the United States Senate developed and began to overshadow the more fundamental issues of state government. This was an expression of a growing public opinion in favor of direct election of United States Senators. In line with this sentiment the House of Representatives repeatedly proposed an amendment to the Constitution providing for popular election of United States Senators but these proposals were blocked by the Senate. Finally the western states began to provide by law for the nomination of United States Senators by a direct primary. This practice was ultimately adopted by thirty states. Of course, it amounted to a mere straw vote since the legislatures could not be restricted by state law in the exercise of a function derived from the Constitution of the United States. But party influences forced the legislatures to elect those nominated in the primaries. The result was that party practice actually changed the method of electing United States Senators without modifying the provisions

<sup>7</sup> Congress removed this disability from those who engaged in the Civil War on the Confederate side.

<sup>8</sup> Farrand, *op. cit.*, I, 20, 46, 51, 52, 55, 58, 61, 149.

of the Constitution. The Senate realizing that further opposition was useless agreed to the Seventeenth Amendment which was proclaimed by the Secretary of State, May 31, 1913.

By this amendment the two Senators from each state became popularly elected officials on the same suffrage basis as that required of the electors for the most numerous branch of the state legislators. A vacancy in the representation of any state in the Senate is filled by an election called by the governor of the state; however, the legislature of a state may empower its governor to make temporary appointment until it provides for an election.<sup>9</sup>

There was a strong feeling in the Convention of 1787 that the members of Congress should be paid by the states; this was the practice under the Articles of Confederation, and was regarded as a protection to the states. It was especially urged for the Senators who were to be representatives of the states.<sup>10</sup> It was seen that this arrangement would almost certainly produce inequalities in salaries and make the general government largely dependent on the graces of the states for the character of its officials. It was also decided unwise to fix the compensation of the members of Congress in the Constitution, since undoubtedly changes would need to be made and might be difficult to make by a constitutional amendment. Hence, it was agreed to give Congress the power to fix the compensation of its members by law. Such an act, however, must receive the President's approval or be passed over his veto by a two-thirds vote.

The members of Congress, Senators and Representatives, receive the same compensation. From 1789 to 1815, they received \$6.00 a day for actual attendance; from 1815 to 1817, \$1,500 a year; from 1817 to 1855, \$8.00 a day; from 1855 to the present they have received salaries, and since 1925 have been paid \$10,000 a year.<sup>11</sup> The Senators enjoy the privilege of the "frank" and receive the same allowances as members of the House for mileage, clerk hire, and stationery.

Terms of four, six, seven, and nine years for Senators were suggested in the Convention. It was contended by some that Senators should serve for life.<sup>12</sup> It was finally agreed that the terms should be six years and that one-third of the membership of the

<sup>9</sup> The Seventeenth Amendment did not affect the election or term of office of Senators chosen before its adoption.

<sup>10</sup> Farrand, *op. cit.*, I, 383, 385, 391, 428, 433; II, 166, 180.

<sup>11</sup> From 1855 to 1865, \$3,000 a year; 1865 to 1871, \$5,000; 1867 to 1874, \$7,500; 1874 to 1907, \$5,000; 1907 to 1925, \$7,500.

<sup>12</sup> Farrand, *op. cit.*, I, 218, 291, 396, 408, 418, 420-434.

Senate should retire every two years. It is interesting to note in this connection that the Senators of the British Dominions, which closely resemble ours and which were established after 1787, have longer terms except in a single instance. Their terms are: life terms in Canada, six years in Australia, ten years in South Africa, and twelve years in the Irish Free State.<sup>13</sup> Investigation shows, however, that United States Senators as a rule remain in office twelve years.

## V. RIGHTS AND PRIVILEGES OF MEMBERS

The Senators have freedom of speech and debate on the floor of the Senate. They enjoy freedom from arrest except in cases of treason, felony, and breach of the peace. This is intended to prevent judicial process from being used to interfere with the performance of their official duties. This privilege applies by force of election and, therefore, protects a Senator-elect while en route to Congress for the first time before he has taken the oath of office.<sup>14</sup> He is not subject to prosecution in the courts for libel or slander for any statement made on the floor of the Senate or for its official publication. These privileges are secondary only to representation and exist for the protection of the interests of the constituency of the member. In fact, they are a guarantee of representation and are "necessary to the discharge of paramount public duty."<sup>15</sup>

## VI. THE ORGANIZATION OF THE SENATE

1. *The Senate a Permanent Body.* The Senate is a retiring, and, therefore, a permanently organized body. To effect its organization, the Constitution provided that, as soon as the Senators assembled after the first election, they should be divided into three classes as nearly equal as possible and that the first class should serve two years, the second four, and the third six, so that one-third of the Senate would be elected every two years.<sup>16</sup> The Constitution did not provide how this division was to be made. When the Senate met three lists of names were prepared, the first consisting of six Senators, the second of seven, and the third of six, care being

<sup>13</sup> H. B. Lees-Smith, *Second Chambers in Theory and Practice* (1923), 63, 93, 165, 206; Henry Cabot Lodge, *The Senate of the United States* (1921), 1-31.

<sup>14</sup> David K. Watson, *The Constitution of the United States* (1910), I, 307.

<sup>15</sup> John R. Tucker, *Constitution of the United States* (1899), I, 489.

<sup>16</sup> Art. I, Sec. 3.

taken to prevent the two Senators from the same state from being included in the same list. Then these three lists were placed in a box by the secretary of the Senate and a committee of three Senators representing each class drew these lists, which, in the order in which they were drawn, designated the Senators of the first, second, and third classes who would serve two, four, and six years respectively. When Senators from states not then represented or later admitted into the Union have taken their seats, they have been divided by lot among these three classes in such a way as to maintain their equality. Since the organization of the first Senate, two-thirds of its membership have remained in office after each election. The Clerk of the Senate administers the oath of office to the newly elected one-third either individually or in small groups.

2. *The Officers of the Senate.* The Convention of 1787 at first decided that the Senate could elect its own President and that he should discharge the duties of the President of the United States in case of his removal, death, resignation, or inability; but later it was decided to create the office of Vice-President and that he should be President of the Senate.

This arrangement was based on several considerations. In the first place, it was not a novelty for the chairman of a legislative body not to be one of its members. This is true of the House of Lords in Great Britain, of which the Lord High Chancellor is chairman. It is not legally necessary for him to be a Lord of Parliament. It was thought that since the Vice-President was to possess the same qualifications as the President he would be particularly fitted to preside over the Senate. Again, he needed something to do while he was waiting to succeed to the duties of the office of the President in case of his death, removal, resignation, or inability. It was also following the practice of those states which had lieutenant governors who acted as chairmen of the state senates.

The strongest reason for this arrangement, however, was state jealousy. If one of the Senators should be President of the Senate, the influence of his state would either be increased or diminished. If he were allowed a vote as a member and then a casting vote in case of a tie, his state would be more powerful in the proceedings of the Senate than other states; if he were allowed to vote only in cases of equal division, then his state would suffer in influence. If he were not allowed a casting vote, then the Senate would possess no ready means of dissolving a deadlock.<sup>17</sup>

The Vice-President, therefore, as presiding officer of the Senate,

<sup>17</sup> See Story, *Commentaries on the Constitution* (Abridged Ed.), 269.



is not a partisan chairman. He may or may not be a member of the party in the majority in the Senate. He is not an agent of the unofficial organization of the Senate as is the Speaker of the House. The Senate would not submit to the control of a chairman. The strongest figures among Vice-Presidents have never been able to control its proceedings. In fact, on controversial points of procedure, the Vice-President defers to the wishes of the Senate. In the main he plays the rôle of a parliamentary chairman, putting questions, recognizing members, deciding more or less minor points of order, subject to the appeal of any Senator, and voting in cases of an equal division of the Senate.

It is further provided by the Constitution that the Senate shall choose its other officers, including a president *pro tempore* to act in the absence of the Vice-President or during his exercise of the duties of the office of the President. Other officers of the Senate are the Secretary, whose office employs some thirty subordinates, among whom is the Chief Clerk, the Chaplain, the Sergeant-at-Arms with several assistants, and the Postmaster with subordinate clerks. These offices are a part of the patronage of the party in power.

3. *Committees.* There were seventy-five committees in the Senate prior to the reorganization of its committee system in 1921.<sup>18</sup> They had become too numerous to correlate properly the work of the Senate; many were useless and unrelated to the major problems of legislation; western Senators were demanding readjustments; and the adoption of a national budget system in 1921 made a more effective committee system desirable.<sup>19</sup> The reorganization scheme reduced the committees of the Senate to thirty-four, of which the following ten may be considered of major importance: Appropriations, Agriculture and Forestry, Commerce, Finance, Foreign Relations, Interstate Commerce, Judiciary, Military Affairs, Naval Affairs, and Post Offices and Post Roads.<sup>20</sup> The majority of the more important committees meet regularly, while others are subject to the call of their chairmen.

The membership of the committees of the Senate, as well as their chairmanships, is determined by party caucuses roughly in

<sup>18</sup> Brown, *The Leadership of Congress*, 278.

<sup>19</sup> For a discussion of the development of the committee system of the Senate, see Lauros G. McConachie, *Congressional Committees* (1898), 321-348.

<sup>20</sup> For a complete list of the committees of the Senate and committee assignments, see *Congressional Directory*, 70th Cong., 1st Sess. (1927), 192-197.

proportion to the relative strength of the parties in the Senate. It is customary for each caucus to elect a committee to propose a committee "slate" which is ratified by the caucus. The action of the caucuses is later officially approved by the Senate. The committees of the Senate are small, ranging from three to seventeen members, and no Senator since 1919 can be a member of more than two of the ten major committees or a chairman of more than one of these committees. Subject to this limitation the rule of seniority governs committee and chairmanship assignments. Of course, by the rule of seniority, it is not meant that the oldest members of the Senate from the point of view of service hold the chairmanships of all its committees, but that those who have served longest of the party in power in the Senate will receive these assignments. This rule in both Senate and the House works within party ranks and may for disciplinary purposes be varied. It puts a premium on the retention of members of Congress in office if their respective constituencies desire their representatives to hold the strongest places in the legislative machinery.

4. *The Control of the Senate.* It has already been shown that the caucuses of the two parties are responsible for the legislative committees. It would not be observing sound principles of control, however, to trust these committees with unrestricted initiative or recommendation. The Rules Committee and the Steering Committee are the chief agents in the regulation of the procedure of the Senate in so far as any control exists. The rules of the Senate are more liberal than those of the much larger House. Much of the work of the Senate is done by unanimous consent, and gentlemen's agreements, and each Senator in charge of a bill is his own Floor Leader. The right of unlimited debate and the power of any Senator to call any bill for consideration at any time make effective discipline in the Senate almost impossible. The Steering Committee of the Senate was established by the Republicans in the Sixty-sixth Congress for two purposes: (1) to strengthen the leadership of the Senate, and (2) to unify the program of the party in power by coöperating with a similar committee in the House. It was thought by the more optimistic that this scheme would give the Senate control of the party program in both houses.<sup>21</sup>

<sup>21</sup> Senator Lodge in the Sixty-sixth Congress was chairman of the Steering Committee of the Senate, its committee on Foreign Relations, and the Republican caucus in the Senate. In the Sixty-seventh Congress Senator Curtis, of Kansas, was vice-chairman of the caucus, the Republican "whip," member of the committee on committees, and chairman of the Rules Committee, and member of the Committee of Finance and Appropriations.

The Senate largely controls the House and the President, but does not like to be controlled itself by even the majority of its own members. "Indeed," said Woodrow Wilson, "the Senate is, *par excellence*, the chamber of debate and of individual privilege."<sup>22</sup> This is one of its chief elements of strength, but it enables a few Senators to paralyze the operations of the entire government. In the Sixty-fourth Congress, this feature of its procedure prevented the passage of such a large amount of much-needed legislation that President Wilson, on March 4, 1917, when the measure for the defense of American merchant ships was under consideration, made the following appeal to the nation: "In the immediate presence of a crisis fraught with more subtle and far-reaching possibilities of national danger than any other the government has known within the whole history of its international relations, the Congress has been unable to act either to safeguard the country or to vindicate the elementary rights of its citizens. More than 500 of the 531 members of the two houses were ready and anxious to act; the House of Representatives had acted, by an overwhelming majority; but the Senate was unable to act because a little group of eleven Senators had determined that it should not.

"The Senate has no rules by which debate can be limited or brought to an end, no rules by which dilatory tactics of any kind can be prevented. A single member can stand in the way of action, if he have but the physical endurance. The result in this case is a complete paralysis alike of the legislative and of the executive branches of the Government.

"The Senate of the United States is the only legislative body in the world which cannot act when its majority is ready for action. A little group of wilful men, representing no opinion but their own, have rendered the great Government of the United States helpless and contemptible.

"The remedy? There is but one remedy. The only remedy is that the rules of the Senate be so altered that it can act. The country can be relied upon to draw the moral. I believe that the Senate can be relied on to supply the means of action and save the country from disaster."<sup>23</sup>

The result of this ringing criticism by the President was a special session of the Senate, at which a mild form of closure was adopted to prevent similar occurrences in the future. The substance of this new rule is that whenever sixteen Senators sign a motion to limit

<sup>22</sup> *Constitutional Government in the United States* (1908), 135.

<sup>23</sup> *The New Democracy* (Ed. by Baker and Dodd), II, 433-435.

debate on a pending measure the presiding officer shall state the motion immediately and shall two days later lay it before the Senate which proceeds to vote on the question: "Is it the sense of the Senate that the debate shall be brought to a close?"<sup>24</sup> If two-thirds of those voting favor this motion then the pending measure becomes the unfinished business of the Senate. Thereafter no Senator can speak more than one hour on the measure including amendments or motions relating to it. No amendment can be proposed except by unanimous consent unless it has been presented and read before the vote for closure has been taken. No dilatory motion is in order. Of course, this means that only the Senators engaged in the filibuster will use the allotted time provided by the closure rule.

## VII. ITS SPECIAL POWERS

1. *Confirmation of Appointments.* It looked for a time in the Convention of 1787 as if the Senate would be given the sole power of appointing judges and ambassadors and of making alliances and treaties of peace.<sup>25</sup> To do this work it was thought necessary for the Senate to sit continuously and its members to receive higher salaries than the Representatives. The final decision of the Convention gave the Senate only the power of approving the nominations of the President for positions in the Federal Service.

It was not foreseen at the time that the employees of the government would later be numbered by the hundreds of thousands. It was also expected that the Senate would be uninterested in appointments and would restrict its action to a sort of judicial consideration of the President's nominations. In other words, its action in such matters would be perfunctory and a matter of course. "There will, of course," said Hamilton, "be no exertion of choice on the part of the Senate. They may defeat one choice of the Executive, and oblige him to make another; but they cannot themselves *choose*—they can only ratify or reject the choice of the President."<sup>26</sup>

If men were perfect paragons stripped of all interests, and therefore able to follow judicially the strict letter of the Constitution, the process of appointment might have worked according to Hamilton's prophecy. Another very keen student of American politics at a much later date conjectured that "in ordinary procedure of the Senate, all that remains of its privy council functions is the

<sup>24</sup> See Lindsay Rogers, *The American Senate* (1926), 161-190.

<sup>25</sup> Farrand, *op. cit.*, II, 293.

<sup>26</sup> *The Federalist*, No. 66.



fossil imprints preserved in the phrase that 'the Senate advises and consents' used in ratifying treaties or confirming appointments."<sup>27</sup>

Like so many other parts of the Constitution, the provision relative to appointments has been superseded by a convention of the unwritten constitution known as "Senatorial Courtesy," which, according to Lindsay Rogers, "is a kind of liberum veto, and means no more than this: that while the Senate will not suggest particular nominations, it expects that the President, in naming certain local officeholders (e.g., postmasters and collectors of the customs) will choose persons satisfactory to the Senator or Senators of the President's political party from the State in which the officers are located, or from which the appointees come."<sup>28</sup> Consequently, since the Senators stand by one another in this matter, if the President ignores this convention in making a recommendation for a major appointment, the nomination will almost invariably be rejected. Minor positions are by agreements between the Senators and Representatives of a state generally left to the control of the Representatives if they are members of the President's party. If, however, a state has no Representative or Senator of the President's party in Congress, he consults the boss in his party in such a state, who may be a national committeeman, or a member of the state executive committee, or of a congressional campaign committee. The party boss in any state, whoever he may be, whether Senator, Representative, or a member of the party organization, will be consulted in the interest of party harmony. No hard and fixed rule, but circumstances, frequently differing widely in character, govern the procedure in many instances. In the main it is safe to say that the President must nominate for office the strong supporters of Senators and Representatives who alone are able to advise him in this matter; otherwise he faces a row in his party in which, except in very rare instances, he has little to gain.

Nominations are sent to the Senate by the President and are referred by the Vice-President to the appropriate committee unless otherwise ordered by the Senate. The Senate considers the report of such committee in executive session, no minutes being kept as to its final action. The approval or rejection of nominations is made by a simple majority vote of these present.

2. *Ratification of Treaties.* The Senate exercises a very strong influence on the foreign relations of the nation. The increasing

<sup>27</sup> Ford, *The Rise and Growth of American Politics*, 265.

<sup>28</sup> *Op. cit.*, 24-25.

interdependence among nations in recent years, multiplying their contacts and forcing agreements on matters of common interest, has made the matter of handling our foreign relations one of the major functions of our government. The scope of the treaty-making power does not seem to have been fully appreciated by the Framers nor did they foresee the increased significance that international relations would assume. They were more particularly concerned with the method by which this power would be exercised.<sup>29</sup>

Since the establishment of the government it has been a matter of debate among commentators on the Constitution as to what the phrase "by and with the advice and consent of the Senate" means. It was the result of a compromise between two groups—one advocating that the treaty-making powers should be given exclusively to the Executive in accordance with the practice of European governments at this time, and the other maintaining that, since treaties were to be a part of the supreme law of the land, it should be given to the Senate alone or to Congress.<sup>30</sup> The little state party was anxious to make it an exclusive function of the Senate because of the apprehension that this power, which is undefined in the Constitution, might invade the reserved powers of the states. Time has given some indications that this apprehension was well founded.<sup>31</sup> In view of these circumstances under which the treaty-making power was assigned, it is reasonably certain that it was intended that the Senate be consulted in the negotiation of treaties.<sup>32</sup> Washington repeatedly advised with the Senate in negotiating treaties, but with unsatisfactory results. More recent practice indicates that the Senate does not participate in negotiation. Of course, the size of the Senate would sooner or later have made this practice impracticable.<sup>33</sup>

The treaty-making process has become, therefore, a matter of convention, and may be said to consist of rather definite steps. The

<sup>29</sup> See Edward S. Corwin, *National Supremacy* (1913), 205-238.

<sup>30</sup> Watson, *op. cit.*, II, 950-967.

<sup>31</sup> W. W. Willoughby, *The Constitutional Law of the United States*, I, 450-455.

<sup>32</sup> See W. H. Dewhurst, "Does the Constitution Make the President Sole Negotiator of Treaties," 30 *Yale Law Journal*, 478; Willoughby, *op. cit.*, I, 456-458.

<sup>33</sup> See Quincy Wright, *The Control of American Foreign Relations* (1922), 360-373; Edward S. Corwin, *The Control of American Foreign Relations* (1917), 84-116; and John M. Mathews, *The Conduct of American Foreign Relations* (1922), 152-166, and *American Foreign Relations* (1928), 412-428.

first is negotiation, which practice has assigned to the President; the second is unconditional approval, approval with interpretations or reservations, or rejection, by the Senate; and third, is presidential ratification. If the Senate ratifies a treaty with reservations, there are two courses open to the President: (1) he may reopen negotiations with the nation or nations involved with a view to securing their acceptance of the reservations, or (2) he may drop the matter entirely. The President may withdraw a proposed treaty from the Senate or he may refuse to ratify himself after Senatorial approval has been obtained.

The Senate considers treaties in executive session. When a proposed treaty is received by the Senate from the President, it is referred by the presiding officer to the Committee on Foreign Relations, which after due consideration makes a recommendation as to the proper course of action—whether to authorize ratification with or without reservations or to reject. The Senate will likely follow the recommendations of its committee. A two-thirds majority of those present are required for approval. This means that thirty-three of the ninety-six members of the Senate can reject or modify a treaty, or, in other words, control the treaty-making process.

The practice of the minority in controlling the ratification of treaties constitutes the crux of the treaty-making process, and has led to the suggestion that a majority should be sufficient for approval, or speaking negatively, it would require a majority to modify or reject a treaty. This would undoubtedly make the treaty-making process work more easily, but it might be contended that it would not furnish sufficient sanction in view of the fact that a treaty is a part of the supreme law of the land, and is therefore on a parity with an act of Congress which has received the approbation of the majority of each house, the President, and, possibly, the Supreme Court. To many critics a more defensible method of accomplishing the same purpose would be for Congress to approve treaties by a simple majority in each house, followed by Presidential ratification. This would identify law-making and treaty-making in their essential respects and eliminate the anomaly of the House having to originate revenue bills to satisfy treaty requirements when it has played no part in the creation of such an obligation.<sup>34</sup>

In view of the growing character of the subject matter of international relations, it is reasonable to conjecture that the treaty-

<sup>34</sup> See Quincy Wright, "The Control of American Foreign Relations," 15 *Am. Pol. Sci. Rev.*, 1-26.

making power is scheduled to play a much larger part in the future relations of the United States in world politics than has been the case in the past. Unless a more satisfactory *modus operandi* for exercising this important power of the national government can be provided, it appears that the influence of this great idealistic nation as a world power will be considerably circumscribed—an influence so imperatively needed and so earnestly desired by mankind as to make the failure of its proper use amount to the loss of the most glorious opportunity for service to the human race that history has ever laid at the door of any nation. For a nation which has so conducted itself for almost a century and a half as to gain the confidence of mankind to permit a mere mechanical device to prevent it from assuming its proper place among the powers of the world is a challenge to its most constructive statesmanship to follow the example of the Founding Fathers, who in the light of their experiences unhesitatingly made “more perfect” an existing order which in their opinion did not meet the “exigencies” of the time. History has vindicated their work. “The treaty-making machinery of the United States,” says a practical statesman, “has become so complicated as to be almost unworkable. Only by the exercise of great powers of conciliation or of domination by the President, or by awakening and directing upon the Senate a vigorous public opinion, can any progress be made in international relations. A body of ninety-six men of such diverse characteristics and opinions as the members of the Senate is almost hopeless as an executive force. But it is ideal for purposes of obstruction. If the United States is to move forward in helpful coöperation with the other nations of the world towards the attainment of international peace, it will only be through the expression of a widespread and strongly expressed public opinion, which the Senate may apprehend is to be translated into votes.”<sup>35</sup>

3. *Court of Impeachment.* While logic and experience in the states and in Great Britain suggested that the House of Representatives was the proper body to impeach the public officers of the nation, it was by no means clear to the Convention of 1787 that the Senate was the proper agent to try cases of impeachment. Four proposals were made for the exercise of this power:<sup>36</sup> (1) the Supreme Court, (2) a separate tribunal, (3) a joint session of the Supreme Court and the Senate, and (4) the Senate alone. It was

<sup>35</sup> George W. Wickersham, “The Senate and Our Foreign Relations,”  
2 *Foreign Affairs*, 191-192.

<sup>36</sup> Elliot's *Debates*, V, 188, 205, 329, 332, 380, 528, 529, 534.



thought improper for the Supreme Court to exercise this power since a case of the impeachment of the President would be tried by his own appointees. Hamilton in his comprehensive defense of the final solution of the matter which was that the Senate alone would exercise this power said: "Where else, than in the Senate, could have been found a tribunal sufficiently dignified, or sufficiently independent? What other body would be likely to feel *confidence enough in its own situation*, to preserve uncowed and uninfluenced, the necessary impartiality between an *individual* accused, and the representatives of the people, his accusers?"<sup>37</sup>

The Constitution requires that the Senators shall take an oath<sup>38</sup> or affirmation when the Senate sits as a "high court of impeachment," that the Chief Justice of the Supreme Court shall preside when the President is being tried,<sup>39</sup> and that a two-thirds vote of the members present is requisite for conviction. The effect of conviction is limited to removal from office, but this restriction does not prevent subsequent criminal prosecution in Federal Courts. There is no appeal from the Senate's decision nor can the President pardon the convict.

When the Senate is properly organized for the trial of an impeachment case, the House managers appear and file the articles of impeachment, duly signed by the Speaker and attested by the Clerk. The Senate then issues a summons to the accused, fixes the date for the filing of his answer, and in conjunction with the House managers sets the time for the beginning of the trial. If the accused does not appear in person or by counsel, the trial proceeds on a plea of not guilty. It seems that the Constitution in requiring a special oath of Senators and in using the legal terminology of "try," "conviction," and judgment contemplates the use of judicial procedure in trials of impeachment, and in the main this method of procedure has been followed in the nine cases which have been brought before the Senate, although partisan feeling and coercion have at times asserted themselves. It is exceedingly difficult, if not impossible, to convert politicians into judicial officials; moreover, impeachment trials offer fine opportunities for a great display of party strategy.

<sup>37</sup> *The Federalist*, No. LXV.

<sup>38</sup> This oath is usually administered to the Secretary of State by some qualified official, who administers it to the presiding official who in turn administers it to the Senators. The Chief Justice in the trial of President Johnson was not required to take the oath.

<sup>39</sup> The Vice-President, or in case of his inability, the President *pro tempore*, presides on other occasions.

## VIII. ITS PLACE IN THE SYSTEM

There is scarcely a function assigned to the Senate by the Constitution, whether it be of a legislative, executive, or judicial character, that has not by some means, constitutional or otherwise, been made controlling over the subject matter involved, and in addition powers assigned to other divisions of the government have in some instances been subjected to almost complete senatorial control. In the process of legislation, appointment, and treaty-making the Senate is the strongest factor; it controls the patronage of the President and revenue bills which constitutionally the House has the exclusive power to originate; and it is equally powerful over appropriation measures. The Senate practically operates on the basis of the unwritten constitution.

Several causes have contributed to this growth in the powers of the Senate: (1) the general expansion in the functions of government; (2) the exceptional growth in the functions of the Executive, in the performance of which the Senate is associated; (3) popular election of United States Senators; (4) the close association of Senators with the major economic interests of society, they frequently having been corporation lawyers or big business men themselves; (5) the (usual) greater ability of Senators as compared with members of the House; (6) long terms of office and still longer periods of service; (7) the rules of procedure of the Senate which have enabled it to become the forum of the nation;<sup>40</sup> (8) the size of the Senate, which gives its members an individualism that contributes to their development and influence; (9) the absence of the cabinet system, which has furnished the Senate its opportunity by denying to the House of Representatives the power of making and unmaking governments. This is possibly the crux of the whole matter, and for it the Constitution is responsible.<sup>41</sup>

<sup>40</sup> See Rogers, *op. cit.*, 117-190.

<sup>41</sup> See Lees-Smith, *op. cit.*, 153-159, and Bryce, *The American Commonwealth* (1922), I, 113-125.

## CHAPTER XXI

### THE PROCEDURE OF CONGRESS

#### I. SESSIONS

The sessions of Congress are held in the Capitol building, Washington, D. C., a handsome sandstone and marble structure overlooking the city, the snake-dancing Potomac, and the Virginia hills to the south—a panorama of grandeur and majesty, forming a most suitable environment for a body whose task is to legislate for the greatest nation on earth. The House occupies the south wing of the capitol and the Senate the north. The seats in each wing are arranged in half-moon fashion after the order of the legislative bodies of continental Europe; however, the large membership of the House made necessary the installation of benches in 1913 after the manner of the British Parliament; the Senate still uses desks. Originally, seats in the House were assigned by mutual agreement; in 1845 the House provided for their assignment by lot; but beginning with the Sixty-third Congress, the practice of assigning members to particular seats was discontinued.<sup>1</sup> The Senate because of its permanent character pursues the policy of allowing a new member to select and occupy regularly any vacant seat.

Further facilities, consisting of numerous committee rooms, a commodious office building, legislative reference assistants, legislative counsel for each house, a library in the Capitol, and the Library of Congress are provided to increase the efficiency of Congress because research is a very necessary prerequisite to scientific legislation.

The Constitution requires Congress to meet annually, and designates the first Monday in December as the date, which, however, may be changed by Congress. There are two regular sessions of each Congress; a long session, beginning in December of the odd years and ending with the adjournment of Congress usually in June or July; and a short session, beginning in December of the

<sup>1</sup> *House Rules and Manual* (70th Congress), 412.

## THE PROCEDURE OF CONGRESS

even years and ending on the following fourth of March. Congress is, therefore, in session ordinarily about one-half of its legal term of two years. The President, however, has the power "on extraordinary occasions" to "convene both houses or either of them,"<sup>2</sup> and has frequently called Congress in extra session and on a few occasions has convened the Senate to consider executive matters. The Presidential succession law of 1887 empowers a Secretary of the Cabinet on succeeding to the duties of the presidential office to call an extra session of Congress. Congress unlike many of the state legislatures has no constitutional means of assembling on its own initiative.

An unfortunate feature of the session of Congress is the delay in the meeting of a new Congress unless an extra session is called prior to its first regular session. For a Congress to meet for the first time thirteen months after election, at which time its members are campaigning for reelection, amounts to a miscarriage of public opinion. For an old Congress to legislate after many of its members have been defeated for reelection is an anomaly. For a Congressman to be compelled to campaign for reelection before he has even made a single speech in Congress or introduced a piece of legislation, absolutely without a record of any kind, is unfair to both himself and his constituency. When it is recalled that the Senate is practically immune from popular influence due to its permanent character, this feature of the House means that the entire Congress has had no recent contact with the electorate. Since new issues frequently arise between the election and meeting of Congress and since public opinion is constantly changing, it is difficult to see how under such circumstances Congress can enjoy the confidence of the nation. It is even more difficult to understand why Congress has not in its own interest readjusted itself in its relation to the current forces of American politics. This could be done by legislative act. Congress should meet in its first regular session in December following its election in November.

There is no dissolution or prorogation of the American Congress by executive action as is the case with European parliaments which are, therefore, constantly subject to election and are for this reason always mindful of public opinion. Elections in the American system occur only on the expiration of legal terms of office or in case of a vacancy and should, therefore, be immediately followed by legislative action.

<sup>2</sup> *The Constitution*, Art. II, Sec. 2.

$$\begin{array}{r} 43.5 \\ 328 \\ \hline 27 \end{array}$$

$$\begin{array}{r} 128 \\ 74 \\ \hline 54 \\ 379 \\ \hline 81 \end{array}$$



"Neither house, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting."<sup>3</sup> The purpose of this provision is to prevent either house, without the consent of the other, from adjourning indefinitely and stopping the legislative process. With the two houses frequently under the control of different political parties this practice might otherwise be used as a means of filibustering. The two houses adjourn by agreement at the end of a session; however, the President may adjourn them in case of disagreement.

## II. THE RECORDS OF CONGRESS

The Constitution requires that "each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either house shall, at the desire of one-fifth of those present, be entered upon the journal."<sup>4</sup> The object of this provision is to secure a permanent record of legislative action and publicity of proceedings. It also fixes responsibility upon each member for his vote, but since a roll-call consumes considerable time and would have no significance except on important matters, it was wisely provided that this method of procedure may be employed only when one-fifth of the members present in either house demands it. Even this restriction has not prevented its use for partisan and filibustering purposes. This provision, said Justice Miller, "whether wise or unwise, is the fruitful source of a great waste of time. It may be very well doubted whether the call of the yeas and nays in the House of Representatives, which necessarily consumes a great deal of time, is not resorted to more for that purpose than any other, thereby frequently defeating a measure which a majority of the House is prepared to pass."<sup>5</sup> The debates in Congress have been published under several titles: (1) The Annals of Congress (1789-1824); (2) The Register of Debates (1824-1837); (3) The Congressional Globe (1833-1873); and (4) The Congressional Record (1873 to the present).

The Journal of Congress is considered by the courts as evidence that a bill attested by the presiding officers of the two houses

<sup>3</sup> *Ibid.*, Art. I, Sec. 5.

<sup>4</sup> *Ibid.*, Art. I, Sec. 5.

<sup>5</sup> Samuel F. Miller, *Lectures on the Constitution* (1891), 197.

and approved by the President has met the constitutional requirements involved in the legislative process. When a bill is thus attested and deposited in the archives of the government, its authentication is regarded as "complete and unimpeachable." "The respect due to coequal and independent departments requires the judicial department to act upon that occurrence, and to accept, as having passed Congress, all bills authenticated in the manner stated; leaving the courts to determine, when the question properly arises, whether the act, so authenticated, is in conformity with the Constitution."<sup>6</sup>

- It should also be remembered that the debates in the House are limited and that the *Record* will contain speeches that have never been delivered on the floor of the House. The House, by unanimous consent, given as a matter of course, grants "leave to print" to its members, by means of which they can modify their speeches after their delivery or extend their remarks in print.<sup>7</sup> Even the Senate follows this practice in a restricted form. By this means the members of Congress hope to impress their constituents with the importance of their services.

Congress has not confined its activities to the mere framing of laws. It has been responsible for the collection and publication of a tremendous amount of social, economic, and political data indispensable to students of our national problems. The administrative agents of the government are frequently requested by Congress to make reports on various subjects which are published in what is known as the Congressional Set. This series of publications made its appearance in 1815 and the volumes are numbered consecutively from this date. They are labeled as Senate or House documents according to their origin or nature: S. doc. (Senate document), S. ex. doc. (Senate executive document), and S. misc. doc. (Senate miscellaneous document); H. doc., H. ex. doc., and H. misc. doc. A set of indices for these documents are: (1). Poore's Descriptive Catalogue of Government Publications (1774-1881); (2) Ames's Comprehensive Index to the Publications of the United States Government (1881-1893); and (3) the

<sup>6</sup> *Field v. Clark* (1892), 143 U. S. 672.

<sup>7</sup> The printing of the debates was a private venture until the appearance of the *Congressional Record* in 1873, although it had the approval of Congress. A set of ten or twelve volumes is published for each session of Congress with a rather poor index in the last volume. The pages run consecutively through the set, but since there are two sets printed, identical except as to page numbering, it frequently happens that it is necessary to consult both sets as the index to one set may not give the proper page reference to the other.

Document Catalogue (1893 to the present) published by the government.

Legislative committees make reports on the bills which they have favorably considered, giving the results of their hearings and investigations. These are published by the government and listed in the catalogue of documents. The annual volume on Foreign Relations of the United States, issued every year since 1862 with three or four exceptions, containing a compilation of treaties, protocols, and correspondence of presidents, secretaries of state, and others, is very helpful to students of our foreign affairs. The volume on Commercial Relations of the United States, appearing annually since 1856 with the exception of three years in the seventies, containing the correspondence of our consular representatives, is a very valuable source of information.

The Acts of Congress are published as a separate volume for each Congress, and are known as the Statutes at Large (cited as Stat. L., or St. at L.). A paper-bound volume is published after each session of Congress, and after each Congress these are bound in a single volume. The statutes were published as a private venture until 1875, at which time Congress placed the direction of their publication under the Secretary of State, who since 1901 has issued each volume in two parts: Part I, Public Law; and Part II, Private Laws.

Since the Statutes at Large contain only the law on any subject passed by a particular Congress, it is frequently more desirable to consult a source which contains all the law in force on any subject on which Congress has legislated since the foundation of the government. This great source is "The Code of the Laws of the United States of America in Force December 6, 1925."<sup>8</sup>

### III. QUORUM

A quorum of a legislative body is the number of its members required to be present for the transaction of business, and in our system it is fixed by the Constitution at a majority of each house.<sup>9</sup> A smaller number has the power to adjourn from day to day and to compel the attendance of absentees through the use of force

<sup>8</sup> See Austin F. Macdonald, *Elements of Political Science Research* (1928) for very valuable information on materials and their use for a scientific study of government.

<sup>9</sup> A quorum of each house consists of the majority of those members chosen, sworn, and living whose membership has not been terminated by resignation or action of their respective houses.

by the sergeant-at-arms. The Constitution does not prescribe the method of determining the presence of a quorum. This matter is, therefore, left to the competence of the houses, and might be done in several ways: (1) the presiding officer of each house might count those present; (2) the roll of the ayes and nays could be called; or (3) the membership might be marched between tellers and counted. The roll-call is the method generally pursued and it has been held that the fact of presence rather than voting is the proper basis for determining the existence of a quorum. The legality of this matter has been settled by the Supreme Court: "Under the provisions of the Constitution, when a majority are present, the House is in a position to do business. Its capacity to transact business is then established, created by the mere presence of a majority, and when that majority are present the power of the House arises."<sup>10</sup>

#### IV. THE COMMITTEE OF THE WHOLE

The committee of the whole is a legislative device that originated in the days of the Stuarts in England for the more informal consideration of legislative measures. The chief purpose of its origin was to dispose of the Speaker of the House of Commons who was at this time the minion and tale-bearer of the King and who straightway reported the proceedings of the House to him. The earlier practice was for the Speaker to withdraw from the House of Commons when it assumed the form of the committee of the whole, but later practice allows him to appoint the chairman of the committee and to be a member of it since he is a member of the House and since his absence is no longer desirable.<sup>11</sup> This form of procedure has come to have very definite advantages and in the American system works as follows:

1. The House of Representatives on motion by one of its members votes to resolve itself into a committee of the whole.
2. The Speaker yields the chair to a special chairman whom he appoints and takes a seat in the committee.
3. The chairman of the committee whose bill is to be considered reports the recommendation of his committee and discusses its proposal.
4. One hundred members since 1890 constitute a quorum of the committee of the whole, whereas a majority (218) is re-

<sup>10</sup> *United States v. Ballin* (1892), 144 U. S. 5.

<sup>11</sup> Robert Luce, *Legislative Procedure* (1922), 87-91.



quired of the House. Frequently not even one hundred members are present; only those attend who are interested in the particular bill under consideration. A small attendance means less talk and a better verdict.

5. Debate proceeds informally, five minutes being allotted to each speaker at a time, except by unanimous consent. Speeches are not only brief, but are pointed, business-like, and conversational in style. The object is information and not oratorical display for the entertainment of the galleries.

6. The bill is read and critically discussed section by section with considerable cross-fire and display of intellectual acrobatics. In fact, it is in this procedure that the House gives the best account of itself.

7. There are no roll-calls; divisions are by rising vote or by tellers.

8. When debate has ended and all votes have been taken, the committee votes to rise and the Speaker resumes the chair.

9. The chairman of the committee of the whole then reports its findings and recommendation for the consideration of the House.

The House sits as a committee of the whole under two styles: (1) Committee of the Whole for Private Bills and (2) Committee of the Whole House on the State of the Union for Public Bills. All revenue and appropriation bills are considered in the committee of the whole and these matters consume the greater portion of the time of the House.

The Senate considers in the committee of the whole every bill that has passed the second reading. The Vice-President remains in the chair; the quorum is a majority of the Senate; and the yeas and nays may be demanded and entered on the *Journal*. In fact, the committee may do practically anything the Senate can do. After debate has closed, the chairman announces that the bill, having been considered in the committee of the whole is now before the Senate for the consideration of the committee's action.

## V. CONFERENCE COMMITTEES

"The Conference Committee and the rules and customs that have grown up around," says McCown, "form a vital part of the legislative system at Washington."<sup>12</sup> When there is disagreement between the two houses of Congress over the details of a bill that has passed both, the house in charge of the bill and the

<sup>12</sup> Ada C. McCown, *The Congressional Conference Committee* (1927), 11.

papers relating to it invites the other house to a conference. The presiding officer of each house appoints three "managers," usually consisting of the chairman, the next ranking majority member, and the ranking minority member of the committee. A conference committee works under certain limitations: (1) its recommendations are restricted to the differences to be settled; (2) in financial matters, it is limited by the maximum and minimum recommended by the houses in the bill under consideration; and (3) the members from each house vote as a unit. The recommendations of the conference committee are generally adopted by the two houses, but in case the committee is unable to reach an agreement, the chairman of the committee of the house in which the bill originated so reports. Either house may then recede from its position, or the bill may be returned to the conference committee. In the event of ultimate disagreement in conference, the bill fails.

The Conference Committee is a very useful legislative agent, especially in the American system where the two houses possess practically equal legislative authority. It is the means of unifying the legislative process. It also is used by the President to gain his contention in legislative matters. He may back the conferees of the house that more nearly represents his point of view or he may induce the entire committee to propose changes in the bill, which the differences between the houses do not involve.

The report of a conference committee is highly privileged. It is in order at any time the *Journal* is not being read or vote taken. A motion to adjourn cannot intervene; only a recess previously fixed or acquisition of privilege relating to the integrity of the House has precedence.<sup>13</sup>

## VI. JOINT COMMITTEES

Congress maintains joint standing or select committees to consider subjects on which united action is necessary or to exercise concurrent jurisdiction of an executive character. Joint committees and commissions have charge of printing, the library, the interparliamentary union, employment for federal prisoners, Northern Pacific land grants, and internal revenue taxation. These commissions may recommend legislation or exercise administrative functions. A joint standing committee is ordinarily created by statute; a joint select committee is created by a resolution.

<sup>13</sup> *Ibid.*, 173-227.

## VII. THE COMMITTEE SYSTEM OF CONGRESS

1. *Its Development.* The committee system of modern legislative bodies is a comparatively recent evolution and is now a universal phenomenon whether the form of government is of the Congressional or Cabinet type. The committee system exercises a stronger influence over legislation in Germany, France, and the United States than in Great Britain, although in the latter country there are tendencies toward a stronger committee system. The degree of control which the cabinets in the parliamentary system exercise over public bills amounts to a limitation on the committee system. In the cabinet system committees do not originate public bills; they exercise only a supervisory or censoring power over such measures; while in the American system they originate all bills or at least exercise the power of determining the policy and the provisions involved in a legislative measure.

Several factors have given rise to the committee system: (1) The development of representative government demanded a place for the representatives in the legislative process. (2) The large membership of legislative bodies, limiting debate, forced the committee system as a means of giving even a limited consideration to legislative measures. (3) The growing volume of legislation and the short sessions of legislative bodies required a more expeditious process for the accomplishment of their work. (4) The increasing complexity of society and the consequent technical character of legislation called for a legislative method that furnished opportunity for research and careful consideration. (5) In the absence of a cabinet to control the amount of legislation, a committee system is necessary as a means of eliminating undesirable legislation. The average number of bills introduced by a Senator in a single Congress is more than 125 and by a Representative more than 60. Time does not permit and necessity does not require the serious consideration of all these measures. The great mass of them are guillotined by the committees. (6) A committee whose membership is fairly permanent becomes in the course of time sufficiently informed to recommend to Congress the legislation needed concerning the subject matter committed to it.

2. *Reference of Bills to Committees.* After a bill is introduced, numbered, and recorded, it is referred to a standing committee. If it is a special bill, it automatically goes to the committee designated by the introducer of the bill. If it is a public bill, it is referred by the clerk of the House or Senate to the committee which has

charge of its subject matter. If a dispute arises over the reference of a public bill in the House, the Speaker decides the matter.

3. *Committee Meetings.* Since the work of committees is of a more serious and technical character than that of the houses it has been arranged for them to meet in the forenoon and Congress in the afternoon. The more important committees have definitely fixed days for meeting and frequently divide themselves into sub-committees for the consideration of special measures or parts of measures.

4. *The Work of Committees.* When a committee receives a bill, its chairman usually determines, largely on the basis of pressure brought to bear in behalf of the bill, whether it shall be considered. The great mass of bills are eliminated by this method.<sup>14</sup> If the bill is selected for consideration, the committee begins to study its subject matter and provisions by several methods:

(1) The Division of Legislative Reference of the Library of Congress which is maintained for their aid.

(2) Investigation by sub-committees which report their conclusions for the consideration of the committee. The chairmen of sub-committees are powerful agents in the legislative process. The committees usually accept the reports of sub-committees and the houses in turn the recommendation of the committees.

(3) Reports of special investigators employed by committees.

(4) Reports of executive officials whose work the bill under consideration concerns.

(5) Committee hearings in which individuals or representatives of organizations introduce evidence bearing upon the nature and probable effects of the proposed measure.

5. *Report of Committee.* After a committee has completed its investigations, it goes into executive session and prepares its report. "This," says Luce, "is the most interesting, important, and useful part of the work of a Congressman, and the part of which the public knows nothing. Indeed, the ignorance of the public about it is one of the causes of its usefulness. Behind closed doors nobody can talk to the galleries or the newspaper reporters. Buncombe is not worth while. Only sincerity counts. Men drop their masks. They argue to, not through, each other. That is one reason why it would be a calamity if the demand for pitiless publicity of committee deliberations should ever prevail."<sup>15</sup> The committee may do one of several things: (1) It may report favorably or un-

<sup>14</sup> The decision of the chairman is seldom overruled by the committee.

<sup>15</sup> Robert Luce, *Congress* (1926), 12-13.



favorably; or it may not report at all. Of the 9,755 bills and resolutions introduced in the first special session of the sixty-seventh Congress, 415 were reported. There has never been devised a successful method of forcing a committee to report, because the majority of a committee represents the majority party of the house of which it is a part, and, having acted in the first instance under party direction, it is unlikely that its decision would be reversed.<sup>16</sup>

(2) It may modify the bill. (3) It may write a new bill.

### VIII. VOTING

The consideration of a bill or a resolution is followed by a vote. There are four methods of voting in the House: (1) a *viva voce* vote, which is most generally used; (2) a rising vote, which may be demanded by any member dissatisfied with the results of the first vote; (3) a vote by the use of tellers, one for each side, designated by the Speaker, if one-fifth of a quorum demands it; the members pass between the tellers—those in favor of the measure first—and are counted; (4) a vote by yeas and nays if demanded by one-fifth of those present; the clerk calls the roll and the members respond with a “yea” and “nay.” The last method, which is never used in the Committee of the Whole, may be used in the first instance, if properly demanded and ordered. The minority party has frequently employed this method of voting to obstruct the proceedings of the House. It requires about forty minutes to call the roll of the 435 members of the House.

### IX. THE ORDER OF BUSINESS

The order in which the business of the houses shall be considered is a very material matter to the committees which, of course, furnish the material for their consideration, and to the members, who are not equally interested in all bills. There should exist no uncertainty as to the time when any measure is to be considered. This is simple justice to the measure, the interests involved, and the members most concerned. The reputation of the houses for fairness and efficiency requires that the opponents of a measure as well as its friends know the time fixed for its consideration.

<sup>16</sup> The majority of the House since 1910 has had the power to call a bill from a committee after it has been in the hands of the committee for 15 days, but every attempt to exercise this power has failed.

On the other hand, party responsibility which should always be definitely fixed and inescapable, demands that the majority party in each house have the power (1) to determine what business shall be considered, (2) to decide when it shall be considered, and (3) to prevent unnecessary delay in its consideration. The Floor Leader of the majority party in the House who is the chairman of the Steering Committee is the chief factor in controlling these matters. He is the premier of an unofficial cabinet known as the "board of strategy," a group of party whips, who decide these matters. If necessary, the Rules Committee and the Steering Committee may be used for more formal and routine matters.<sup>17</sup> "The power of initiative in the House of Representatives", says Hasbrouck, "thus rests pretty securely in the hands of the leaders. By virtue of agreements or of privilege granted to committees which they control, the measures which the party chiefs bring forward become the regular order for the time being."<sup>18</sup>

The Steering Committee announces a weekly program on Friday or Saturday of each week, but since it is impossible to determine how long any measure will be debated this schedule has to be revised. Some bills consume less and some more time than was anticipated and, as a result, the reports of some committees are reached before the committees are ready to report or when the opponents of the measure are absent or unprepared to speak. Hence it has become customary to depend on the announcements of the Floor Leader for information as to the time fixed for the consideration of a measure.

The business of the House is classified according to its nature and listed on calendars: (1) The Union Calendar for all public bills raising or appropriating money; these bills are considered in the Committee of the Whole; are highly privileged; and may be called for consideration at any time; (2) the House Calendar for all other public bills not raising or appropriating money; these bills are regularly reported by committees in alphabetical order at the "morning hour"; (3) the Private Calendar for private bills such as claims and pensions; they are in order for consideration every Friday; (4) the Unanimous Consent Calendar created in 1909; after a bill has been placed on either the Union or House Calendar any member may ask that it be placed on the Unanimous Consent Calendar; on certain days it is customary to move the suspension

<sup>17</sup> Paul De Witt Hasbrouck, *Party Government in the House of Representatives*, 83-99.

<sup>18</sup> *Ibid.*, 109.

of the rules and the passing of such bills by unanimous consent; objection to this procedure returns the bill to its original calendar; (5) the Calendar of Motions to discharge committees, the purpose being to force committees to report on the bills referred to them.<sup>19</sup>

Furthermore, certain classes of business have been assigned to fixed days and other matters have been privileged. Congress is a local legislature for the District of Columbia and has set aside the second and fourth Mondays of each month for the consideration of its affairs.

The first and third Mondays are used for bills on the Unanimous Consent Calendar when it is in order to suspend the rules and pass a measure through all stages at one vote. A two-thirds majority is required to suspend the rules. Wednesday of each week is used for the consideration of bills on the Union and House Calendars at which time committees having charge of these measures report, in alphabetical order. Friday is assigned for measures on the Private Calendar. Privileged matters have precedence over all others except a question to adjourn. The Rules Committee, the Committee on Elections, the Appropriation Committee, and the Conference Committee may report at any time except when the Journal is being read, the roll being called, or the house is deciding on a proposition. Special orders constantly interfere with calendar procedure.

Procedure in the Senate is more simple and regular. The calendar is regularly followed except by unanimous consent or majority vote otherwise. All bills and joint resolutions reported by a committee are placed on the calendar and are considered in the Committee of the Whole without a change of presiding officer or rules. There are no rules limiting debate except that a Senator without special consent may not speak more than twice on the same day on the same subject.<sup>20</sup> There is no use of the previous question.

<sup>19</sup> The House of Representatives meets at noon on each legislative day and the order of business is: *First*, prayer by the chaplain; *second*, reading and approval of the Journal; *third*, correction and reference of bills; *fourth*, the business on the Speaker's table such as messages from the President and bills returned by the Senate; *fifth*, unfinished business of the previous day's session; *sixth*, the morning hour for committee reports; *seventh*, time to consider motion to go into Committee of the Whole; *eighth*, the orders of the day, the consideration of measures which the House has set for this time.

<sup>20</sup> In 1917 a limited form of closure was adopted whereby on the petition of sixteen Senators sustained two days later by a two-thirds vote a date for the closing of debate on a measure may be set with the effect that a Senator is limited to a single speech of one hour and amendments

The absence of restrictions on debate in the Senate gives the minority the opportunity to criticise the measures of the majority and adds tremendously to the efficiency of the Senate as a legislative body as well as its effectiveness as an investigating agent of the conduct of the executive. It stimulates a Senator to inform himself on the problems of the day because he knows in advance that he will have opportunity to present the results of his investigation. It is undoubtedly largely responsible for the poise and balance in the proceedings of the Senate that make it the strongest single agent of the national government and the most powerful legislative body in the world.<sup>21</sup>

### X. THE THREE READINGS

In this as in many other matters the safeguards of the Fathers have disappeared for several valid reasons. Since the days of rapid printing, it is unnecessary to have a bill read three times by the clerk of a legislative body in order for its sleepy members to catch a few of its provisions. The bills are printed and distributed to the members. Moreover, the volume of business which legislative bodies must accomplish makes this practice impossible. Furthermore, the printed bill makes possible a careful study of legislative measures which in no way would be aided by three readings or by one reading for that matter. There is only one reading which takes place in the Committee of the Whole, unless it is a measure that is only considered in the House. This, however, is called by fiction the second reading of the bill. The first reading is supposed to be by title, but this is no longer practiced because the title of a bill is printed in the *Record*. When a bill has passed the second reading the next question is: "Shall the bill be engrossed and read a third time?" If this question is decided in the affirmative, the bill is read by title unless a reading in full is demanded.

### XI. THE DRAFTING OF BILLS

John Stuart Mill's theory<sup>22</sup> that legislative bodies should not make laws but should restrict themselves to the approving or rejecting of measures framed by experts is becoming more and more

are prohibited except by unanimous consent. This method has never been successfully employed, and apparently no form of closure can be used without robbing the Senate of its chief glory.

<sup>21</sup> See Rogers, *op. cit.*, 161-190.

<sup>22</sup> *Representative Government* (1861), Ch. V.



a matter of practice. The proper wording of law has always been a difficult matter.<sup>23</sup> In fact, inefficient law-making was considered one of the evils of the Confederation and a cause for the remodeling of the government in 1787. "It may be affirmed, on the best grounds," said Hamilton or Madison, "that no small share of the present embarrassments of America is to be charged on the blunders of our governments; and that these have proceeded from the heads rather than the hearts of most of the authors of them. What indeed are all the repealing, explaining, and amending laws, which fill and disgrace our voluminous codes, but so many monuments of deficient wisdom; so many impeachments exhibited by each succeeding against each preceding session; so many admonitions to the people of the value of those aids which may be expected from a well-constituted senate?"<sup>24</sup>

The matter of expert aid to legislators in drafting laws is not a new device in legislation. It was adopted in Great Britain in 1837 where it proved sufficiently helpful to warrant the establishment of the Parliamentary Counsel to the Treasury in 1869. The counsel and the assistant counsel are well paid and adequate legal assistance may be used by the employment of barristers who are paid fees based on the amount of work done. The Parliamentary Counsel prepares all government bills and gives instructions concerning the private bills which receive the support of the government and are, therefore, subject to its amendment. It has been estimated that four-fifths of the legislation of Parliament comes under the direction of the Parliamentary Counsel.<sup>25</sup> It has become an indispensable agent of the Cabinet. It not only performs a necessary service in the legislative process more efficiently than laymen ministers could possibly do it, but also saves for more important purposes the time of the Cabinet which otherwise would be spent on details that have no political significance.

American legislatures by virtue of their extensive use of the committee system have possibly had less need for such assistance, although an analysis of their laws indicates that they could profit considerably from its use;<sup>26</sup> at least they have made much less use of this device than European parliaments. State legislatures have made much larger use of expert aid in the drafting and revision of legislation than Congress. A large part of our litigation and its

<sup>23</sup> Robert Luce, *Legislative Procedure*, 535-562.

<sup>24</sup> *The Federalist*, No. 62.

<sup>25</sup> Sir Henry S. Maine, *Popular Government* (1886), 237.

<sup>26</sup> See Robert Luce, *Legislative Procedure*, 536-539.

cost to both governments and litigants could be eliminated if our laws were made unequivocally clear by the substitution of brevity and lucidity for prolixity and obscurity.

Congress, however, has made a beginning. In 1919, the Office of Legislative Counsel under the direction of two Legislative Counsellors, one for the House and one for the Senate, was created.<sup>27</sup> One is appointed by the President of the Senate and the other by the Speaker of the House without reference to political affiliation and solely on the basis of special fitness for the duties to be performed. Each house now has a Legislative Counsel, an assistant counsel, law assistant, clerk, and an assistant clerk.

The duties of the Legislative Counsellors are to aid in the drafting of bills, resolutions, and their amendments at the request of the committees of either house under the supervision of the Library Committee of each house, which may for their respective houses determine the order in which the requests of any committee shall be considered by the Counsellors. Mastery of language, lucidity of style, familiarity with technical terms, knowledge of both statutory and constitutional law, insight into the structure of society, and foresight as to the probable effects of legislation are some of their qualifications. They should be not merely legal priests but diagnosticians of society as well. There are indications that the committees, executive departments, and commissions are making increasing use of this assistance.<sup>28</sup> The growing volume of legislation and heavy draft on the time of members of Congress for various purposes will undoubtedly in due course assign a much larger sphere of usefulness to these important legislative agents.

## XII. THE PROCESS OF LEGISLATION

After having considered the organization and the manner of operation of the various agencies which are involved in the legislative process, the actual steps in legislation are relatively simple.

The introduction of a bill is an act of an individual member and is accomplished in either house by his laying the bill on the table of its clerk informally. This constitutes its first reading. All revenue bills must originate in the House. All Senate bills are referred by its presiding officer to the proper committee; in the House all public bills are regularly referred by the Clerk to the proper committee, but private bills are endorsed to certain committees by the

<sup>27</sup> Act of Feb. 24, 1919. Ch. 18, Sec. 1303.

<sup>28</sup> Hasbrouck, *op. cit.*, 15, 70, 211, 215, 228, 229.

members introducing them. Committees report from the floor if they enjoy the privilege of reporting at any time; otherwise, they lay their reports on the clerk's table informally. Both the bill and the report are printed and the bill is placed on the calendar. It makes very little difference in the procedure of a bill whether it is introduced in the House or the Senate. If it has been introduced in the House and has, as is indicated above, reached the calendar stage, it is then considered in either the Committee of the Whole or the House where it is read technically a second time but actually the first time and considered. If the bill is considered in the Committee of the Whole, it is reconsidered in the House but is not re-read. If the bill is then ordered for engrossment<sup>29</sup> and third reading, it is read a third time, only by title, and either passed or defeated.<sup>30</sup>

It is then signed by the Speaker and sent by special messenger to the Senate where it is referred to the proper committee by the presiding officer for consideration and report. The committee may not report it to the Senate or may report it with or without amendment. If the bill is reported, the Senate may defeat it or pass it with or without amendment. If the bill is defeated, the House is so notified. If the bill is amended by the Senate, it is returned to the House for reconsideration. The House may accept the amendments of the Senate, or reject them and ask for a conference; or it may notify the Senate of its disagreements, leaving it to that body to accept the original bill or to ask for a conference. If either house asks for conference, the managers or conferees are appointed to adjust the differences and report. If their report is accepted by both houses, the bill is finally passed and enrolled for signature.

The chairman of each division of the joint Committee on Enrolled Bills certifies to its enrollment. The bill, whether a House or Senate measure, is laid before the Speaker for his signature and then transmitted to the Senate for the signature of its presiding officer. The chairman of each division of the Committee on Enrolled Bills carries the bills of his house to the President for his consideration.<sup>31</sup>

<sup>29</sup> If the bill originated in the Senate it has already been engrossed or printed.

<sup>30</sup> If the bill originated in the House and is defeated, it is killed for the session. If it is a Senate bill, the Senate is notified of the action of the House.

<sup>31</sup> The Constitution requires that every order, resolution or vote to which the concurrence of the two houses is necessary (except a question of adjournment) be presented to the President for approval or rejection.

If the President approves the bill, it is deposited in the office of the Secretary of State. If the President vetoes it, it is returned to the house in which it originated, with a veto message, stating the reasons for his disapproval. The bill may be passed notwithstanding the President's objection by a two-thirds majority in each house. In this case the presiding officer of the house last considering the bill transmits it to the Secretary of State for publication.

### XIII. THE COMMITTEE *versus* THE CABINET SYSTEM OF LEGISLATION

The differences in organization and operation of these two systems are possibly more apparent than real and their relative merits after all must be determined on the basis of results.

1. It is generally considered that the centralized cabinet system affords unity of program and that the decentralized committee system lacks coherence in its policy. The program of each system is based on party policy and throughout the process of legislation it is never free from party control. The party organization of the House of Representatives works under an unofficial legislative cabinet in almost as centralized a fashion as is the case with the House of Commons, but the American Senate is not subject to such effective control. The Senate is largely independent of partisan influences, sectional and personal motives being more important than party allegiance. However, if the President's party is in control of both houses of Congress and is under his leadership, there is no valid reason why the American system might not achieve practically the same results in legislation as the cabinet system. The party system in the United States exercises its control of legislation indirectly through the "Invisible Government," while under the Cabinet system party influence is immediate, open, and continuous. After all it is the forces underlying the party organization that dictate the character of the legislative program. So far as organization is concerned, the cabinet system is more in harmony with party government and can work with greater certainty and less friction. Responsibility in the Cabinet system is fixed. The cabinet system of legislation is more partisan than that of the American committee system.

2. It is also contended that the committee system suffers from its lack of contact with the Executive whereas the cabinet system

Concurrent resolutions are not thought of as embracing legislative decisions proper, and are not presented to the President.



which embodies almost complete unity of the executive and legislative agents represents the ideal arrangement. Here again theory is largely substituted for facts. It is well known that the American President has a tremendous influence over legislation, that many of the important pieces of legislation are actually framed by the cabinet members, and that they appear in the committee rooms to urge their adoption. Since legislation under the committee system is determined in the committee rooms, executive influence exerted here amounts to the same as its assertion under the cabinet system on the floor. The difference is largely one of method; though, granting that the results may be the same in each case, the cabinet system is more simple and direct. The question arises, of course, as to whether the executive or legislative body should have the initiative in legislation. Which should supervise the other? How complete should their control be in either case? If we concede that executive initiative in public bills is preferable, should there not be some effective means of revising such measures without the life of the government being involved? Is the ideal system one of complete control of the legislative agent by the executive or of a balance between the two? Many English writers complain of the tyranny of the Cabinet in legislative matters, which threatens the dissolution of Parliament in order to have its way, frequently in trivial matters. In fact, there is not much doubt that Parliament, primarily the House of Commons, has lost its influence over the Cabinet. In truth, Parliament is not supposed to legislate; it is expected to make and unmake governments. When it has lost this power, what is left? The success of cabinet government depends on a proper working relation between the cabinet and parliament. This has not been maintained in either Great Britain, France, or Italy where it has been in operation longest. It has become "executive heavy" in Great Britain and Italy and in France it is under legislative control, through committees that are almost as strong as in the American system. While it may be questioned whether in the American system there is the proper coöperation between the President and Congress, it is also equally open to inquiry as to whether the cabinet system has not broken down in Great Britain under executive dictation. It should be said, however, that either system will vary with the men who have charge of it. Any comparison is true only for the time being, and then is based on actual operation rather than upon forms. It is men and not mechanics that operate governments. It is, of course, always difficult and sometimes impossible for party influences to overcome

the constitutional mechanics of the American system. The success of our system depends largely on perfection of party organization.

3. Furthermore, it has been maintained that the cabinet system secures expertness in legislation as against the haphazard methods of the committee system. If this be true, it is not inherently so; there are several factors in this comparison. In the first place, it is not possible for a cabinet to familiarize itself with every legislative measure under the burden of so many other duties. The result is that undersecretaries and civil servants are in good part responsible for its proposals. The committee system in which each committee has almost a permanent personnel and is in charge of the same subject matter for years should be more competent to recommend legislation than a cabinet that may be in power only a few months and at the most only a few years. In the second place, the size of the country and the volume of legislation needed are material factors. The cabinet system would break down under the burden of American legislation. Our system, of course, makes too many laws, but this is possibly as much the fault of the American people as of the system. In the third place, there is no expert aid or device that can be used in the legislative process by the one that may not be used with equal facility by the other.

4. The committee system is more representative of the nation. Its elimination practically amounts to the overthrow of representative government. Great Britain has simply substituted the cabinet for the King as the legislative agent of the Crown. The Commons are largely helpless. The cabinet plays the game a little more safely than the King played it, by frequently consulting the voters, who likewise have been substituted for representatives. Is government by a little group with the approval of an uninformed electorate preferable to representative government?

5. The advocates of the cabinet system point out that it works in the open while the committee system works in secret. There is a real difference between the two on this score. They both, however, work in secret in the framing of their measures; though the committee system gives a hearing to any group whose interest is involved before the details of measures are determined. American Congressmen contend that secrecy lends itself to efficiency and to a non-partisan consideration in legislation. When bills are in the Committee of the Whole or on the floor there is opportunity for debate and publicity in either system. Such debate and publicity are generally partisan and frequently of questionable value. The cabinet system, however, lends itself more readily to open discus-

sion and publicity, though it is doubtful if legislation is more ably and critically debated anywhere than in the American Senate.

6. The cabinet system requires for its successful operation a dominant house, whereas the committee system makes possible a real bicameralism. It is, therefore, necessary in the consideration of the two systems to understand that each is peculiarly adapted to the system of government in which it is found. A vigorous committee system would destroy cabinet responsibility; this is practically the case in France. The two cannot exist in the same system equally powerful; one must have the ascendancy over the other to secure action. Effective and responsible leadership running through the entire process of legislation is practically impossible in the presence of a strong committee system or real bicameralism.

7. The cabinet system much more effectively supervises private legislation. It is in this matter that the American system degenerates into almost pure bartering. Private legislation is simply a matter of courtesy. The result is that it is voluminous in character and consumes an unwarranted amount of the time of Congress. The cabinet system of Great Britain comes more nearly legislating for the nation as a whole. It may restrict private legislation too severely since there are no local legislative agents in Great Britain. It would seem that, in a federal system of government in which the central agent has only delegated powers, supposedly national in scope, private legislation would not be a problem. It is difficult to see how effective control of this matter can be initiated in a system in which individual initiative in legislation operates.

8. A proper association or coöperation between the executive agent of government and the legislature through its committees will improve either the cabinet or the congressional type of government. There are tendencies in both systems in this direction. Standing committees are becoming an increasing part of the English system and are already a strong factor in both the French and German systems. It has already been shown that the American President and his Cabinet have a very material influence over legislation. It has been frequently suggested that this more or less indirect contact between the President and Congress could be improved by the assignment of seats in Congress and the right of debate to members of the Cabinet. The claim is made that this would convert a secret process into a public one and increase the interest of the press and the public in the work of Congress. All students of human nature and practical politics know that secrecy can never be eliminated, but this fact does not place any discount

on the value of a more direct relation between the executive and members of Congress in the legislative process. It should improve the character of legislation.<sup>32</sup>

#### XIV. THE LOBBY

It is more and more recognized that the extra-legal means of government frequently control its formal machinery. In fact, it is a growing tendency in government to provide a constitutional status for the economic interests of society by occupational representation in the legislative body or by economic councils associated with it. This tendency is seen in the new constitutions of Russia, Germany, and the Irish Free State. The Senate of Belgium is based on group interests. Of course, any system of representation based on political parties will secure representatives of certain interests. In Great Britain, Australia, and, to a less degree, in Canada, labor has its own party. In the United States, the "farm bloc" represents the same tendency.

The interests of society of whatever nature are entitled to their day in court as a mere matter of fairness. If the formal system of government makes no provision for the direct representation of the major interests of society, indirect methods are inevitable. After all, what we are most concerned about is not the abstract theories of the bill of rights, or separation of powers, or judicial review, but the welfare of our occupations. This is why lobbyists are found around all legislative bodies. Moreover, there is a feeling that the political representatives are not and indeed cannot be thoroughly conversant with all the problems of a complex society and that the present system of representation is both inadequate and incompetent. "There is," says Glenn Frank, "an increasing recognition of the fact that there is an inevitable tendency towards unreality in a system that elects its representatives solely upon the basis of arbitrarily and artificially drawn geographical districts that have a less distinctive unity of interests as society becomes more specialized and industrialized."<sup>33</sup> Regardless of the validity of this impeachment, the lobby is a very important factor in the work of Congress. It is a sort of unofficial or functional legislative agent.<sup>34</sup>

<sup>32</sup> For an illuminating comparison of the European and American systems, see James Bryce, *The American Commonwealth* (1923), I, 278-297.

<sup>33</sup> *The Politics of Industry* (1919), 169-170.

<sup>34</sup> E. Pendleton Herring, *Group Representation Before Congress* (1929), 53-77.



More than 150 organizations of economic and social character maintain headquarters at Washington City. Among the more important of these may be mentioned the National Chamber of Commerce, a federation of local chambers throughout the nation; the American Federation of Labor; the American Association of Railway Executives; the Standard Oil Company; the Farm Bureau; the National Lumber Manufacturers' Association; and practically every other conceivable interest. The managers of these organizations are the most capable persons that can be secured, some of whom receive large salaries. They are organized in a fraternal society known as "the Monday Lunch Club" in which they exchange notes. It is the business of these agents to watch legislation touching their interests and to represent their organizations before the committees of Congress. They see that newspaper and magazine articles of a propaganda type appear, and that local groups send telegrams and resolutions to Congressmen in the interests of their organizations. Every possible effort is made to prevent harmful legislation and frequently to secure favoritism.<sup>35</sup> Speaking of the influence of these organizations in legislation, an eminent authority says: "Today the menace comes from organized factions, whether corporate or otherwise massed. Washington now contains the headquarters of many such factions, some of them occupying pretentious buildings of their own, some claiming to speak for millions of voters. Their legislative agents are often capable and well paid, and as their positions depend on getting results, they are a real factor. The old-time lobbyist has gone, but the new brand, though more respectable, has perhaps a more damaging effect by working on the timidity of lawmakers rather than on their cupidity."<sup>36</sup>

The relations of government and business have always been intimate and susceptible of much harm to both, but under present conditions they are so inseparable that it is questionable whether our formal political order is adaptable to the present structure of society. The case has been well stated as follows: "Every year the points of contact—and of friction—between government and private interests have multiplied. In the days of well-water, candles, sorghum, and flatboats, there were no water, gas, sugar, or railroad interests to vex politics. Home-grown food did not call for the inspector. Till the factory came there was no need to bar chil-

<sup>35</sup> Frank R. Kent, *The Great Game of Politics* (1923), 270 ff., and Earl Willis Crecraft, *Government and Business* (1928), 207-224.

<sup>36</sup> Luce, *Congress*, 130.

dren from toil or to enforce the guarding of dangerous machinery. A generation ago the little razorback gas and the horse-car companies had no call to mix in politics; but the advent of water-gas and the trolley, coupled with urban growth, gave them the lard of monopoly profit to defend, and made the public-service corporations the arch-corrupters of city councils. Once the railroads competed, but their consolidators have driven the despairing shipper to look to government for protection. On all sides we see business that, feeling less and less the automatic curb of competition, will soon need the snaffle of public regulation. . . . The state government labors heavily, like a steamboat working through sand on the Upper Nile. The railroads want to avert rate regulation and to own the state board of equalization. The gas and street-railway companies want "ripper" legislation, the authorization of fifty-year franchises, and immunity from taxation of franchises, or limitation of stock-watering. Manufacturers want the unrestricted use of child labor. Mining companies dread short-hour legislation. Publishers want their textbooks foisted upon the schools. The baking-powder trust wants rival powders outlawed. The oil trust wants to turn safety inspection against the independents. A horde of harpies have the knife out for pure-food bills. Brewers, distillers, elevator combines, pet banks, rotten insurance companies—all have a motive undermining government by the people.

"Thus time adds to the number of interests intent to break or to skew the rules of the game. The phalanx lengthens of those who want government to be of India rubber and not of iron. Of course this resistance produces results. Under a pressure of ten talents men collapse who were adamant under the pressure a single talent can exert. In view of the temptations we send them against, we ought not to marvel that so many public servants bend or break. It is not to be expected that government can withstand the growing strain without many structural improvements. In any case it is certain that to the upholding of the rules of the game society must devote an increasing share of its thought and conscience." <sup>37</sup>

## XV. SUGGESTIONS FOR THE IMPROVEMENT OF THE WORK OF CONGRESS

I. The improvement of the work of Congress is a much broader subject than the mere mechanics of its houses. (Better informed voters and improved nominating and election methods are basic)

<sup>37</sup> E. A. Ross, "The Rules of the Game," 100 *Atlantic Monthly*, 327-328.

Undoubtedly experience will lead to the creation of a more efficient electorate through the innumerable agencies that are now working for its improvement. It is also to be hoped that the present form of primary is not the last stage of experimentation in nominating methods; yet it has lengthened the life of Congressmen; and if there be any merit in experience, it would seem that it has increased the efficiency of Congress. Trial and error is the method forward.

2. The further elimination of the spoils and corruption of politics by the expansion of the merit system and the restriction of campaign funds, on which a mere beginning has been made, will tend to make politics more decent and encourage the honest and trained men and women of the country to enter public service.) As long as playing the game of politics means being butchered in the slaughter house of character, only men and women who can afford to gamble in such high values will participate in the game. "If the next forty years see as much progress as the last forty," says Luce, speaking of the cost of nominations and elections, "1965 will find the whole cost borne as it ought to be, by the taxpayers, and private outlay will have disappeared. Election to office is a public, not a private concern, and individuals have no business to vitiate by the use of money the ascertainment of the public will." <sup>38</sup>

3. Congress could profit from the experience of English and Continental legislative bodies by adopting a Provisional Order System. (The principle involved is that of delegating minor law-making power which has been the practice of state governments from the beginning with reference to local government.) Congress consumes a considerable amount of time with the details of administrative regulations which should be left to the administrative agents themselves. Confirmation or rejection of such orders or regulations by Congress would be a sufficient safeguard to warrant this practice. The provisional orders in Great Britain are ten times as numerous as the statutes of Parliament.

4. Devolution should be adopted with reference to the government of the District of Columbia and our territories. The House of Representatives composed of 435 members dedicates one-twelfth of its time to the District. The District could be governed much better by the commission-manager type of government under the supervision of Congress. Likewise the territorial governments should assume the burden of governing their peoples. This does not mean self-government for either the District or the territories

<sup>38</sup> *Congress*, 136.

but primarily the divesting of Congress of the initiative in these relatively less important matters about which it cannot be informed and to which it cannot give the time necessary for their efficient management.

5. More extensive use of special commissions composed of experts to make studies of complicated problems and recommendations for legislation. Such agents as the Tariff Commission and the Coal Commission can furnish technical information to a committee that is indispensable to the formulation of a sound policy and the framing of proper legislation on many important matters. The committees should have the use of government experts in such matters instead of being dependent on private agents in the employment of the interest to be regulated.

6. The Court of Claims should be made a court of final jurisdiction for the settlement of most of the claims against the government. Other courts and commissions have complete control of matters of far greater significance to the nation than the great majority of the claims now considered by the court of claims as a sort of committee of Congress.

7. Congress should make more use of the Legislative Counsel. The drafting of bills with the proper phraseology and legal import is a far more difficult task than the formulation of the general principles of legislation. Moreover, a clearly phrased law is easily administered and litigation is much less likely. Tremendous relief would be furnished the courts by the proper use of drafting and revision agents in the legislative process.

8. In short, Congress should have more time and make better use of it. It should restrict itself to matters of broad policy. It should spend less time calling the roll, considering trivialities, and permitting privileged matters to exclude others more important. It should regard its work in the light of a business matter and execute it in an expeditious and efficient manner.

It should be said, however, that the faults of the American Congress are, in general, the defects common to legislative bodies throughout the world. Not only is more expected of the legislator of today than ever before, but scientific and mechanical progress has made his problem much more difficult. Criticism is also much more alert. It therefore requires a higher order of Congressman today to perform his duties as well as the Congressman of the forties did his work. Speaker Gillett, on leaving the House, after a longer continuous service in that body than any other member in its entire history, said: "Possibly the House is not as brilliant as



it was thirty years ago. It certainly is not as dissipated. It does more work. And in my opinion, weighing carefully my words, the average ability, industry, and serious devotion to duty is higher today than when I came." <sup>39</sup>

<sup>39</sup> Quoted by Luce, *ibid.*, 154.

$$\begin{array}{r} 404 \\ 33 \overline{) 66} \\ 66 \\ \hline \end{array}$$

$$\begin{array}{r} 34 \\ 1 \overline{) 46} \\ 46 \\ \hline \end{array}$$

$$\begin{array}{r} 4 \\ 3 \overline{) 76} \\ 76 \\ \hline \end{array}$$

$$\begin{array}{r} 418 \\ 37 \overline{) 40} \\ 40 \\ \hline \end{array}$$

$$\begin{array}{r} 417 \\ 37 \overline{) 40} \\ 40 \\ \hline \end{array}$$

J. C.

## CHAPTER XXII

### NATIONAL REVENUE

#### I. IMPORTANCE OF THE POWER TO TAX

Of all the powers of government, the power to tax is the most important, the most pervading, and the most liable to abuse. It touches all classes of people either directly or indirectly. Through its exercise great economic readjustments may be brought about; "swollen fortunes" may be materially reduced; billions of dollars may be raised for the support of numberless governmental organs and activities. In its use every fundamental principle of political economy should be employed. In conjunction with the power to regulate currency and banking, it affects vitally the nation's business and commerce. Once granted the unrestrained power to tax a certain thing, there is apparently no limit to the amount our government may impose.<sup>1</sup> As a weapon in the hands of a legislative body, it may be employed to encourage a particular business or to destroy it. Truly, in the words of Chief Justice John Marshall, "the power to tax involves the power to destroy."<sup>2</sup> The proper use of this great power to meet the constantly increasing totals of governmental expenditures is one of the vexing questions of democratic government.

#### II. TAXATION UNDER THE ARTICLES OF CONFEDERATION

The financial impotency of the national government under the Articles of Confederation was one of its chief weaknesses and was due, in large part, to the lack of power in Congress to levy taxes. National expenses were to be defrayed from a common treasury, into which each state was expected to pay the amount requisitioned by Congress, but there was no method which the national authorities could employ to compel a state to pay its proportion of the public burden except the use of armed force. The states jealously

<sup>1</sup> C. K. Burdick, *The Law of the American Constitution* (1922), 180.

<sup>2</sup> *McCulloch v. Maryland* (1819), 4 Wheaton 316.

<sup>3</sup> *Articles of Confederation*, Art. VIII.

reserved to themselves the exclusive right to tax the individual, his property or his person. As a result the government of the Confederation was helpless in the field of finance. Its requests for funds were either ignored completely or only partially met by the states. Moreover, the states vied with one another in misusing the fiscal powers which they possessed. Depreciated paper money flooded the country; business was languishing; chaotic financial conditions accentuated the loss of public confidence. Every attempt to amend the Articles so as to give Congress a limited source of revenue was blocked, under the amending clause requiring unanimity for adoption, by one dissenting state.<sup>4</sup> Consequently, if there were any single point upon which the Fathers agreed in the Convention of 1787, it was to give the national government a source of revenue independent of state action and free from state control.

### III. THE TAXING POWER OF CONGRESS

The taxing power of a government is the basis of its existence and must be such as to make adequate provision for this purpose. However, limitations upon the exercise of this power by any government are necessary to protect the liberty of the individual and the development of the institutions of society.

✓ 1. *Constitutional Limitations upon the Taxing Power of Congress.* First among the eighteen enumerated powers of Congress contained in the Constitution is the power "to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States." This general grant of power, with the few limitations explained hereafter, was the answer of the Convention of 1787 to the financial impotency of the general government of the Confederation. It was only natural that this great power of raising revenue, "the essential engine by which the means of answering the national exigencies must be procured",<sup>5</sup> should stand first among those

<sup>4</sup> For a graphic account of the chaotic conditions existing in this country under the Articles of Confederation, see J. Fiske, *The Critical Period of American History* (1899). For a clear argument on the necessity of giving the national government an independent revenue power, see *The Federalist*, No. 30, by Alexander Hamilton.

<sup>5</sup> *The Constitution*, Art. I, Sec. 8, Cl. 1. "Duties, imposts and excises" are used in antithesis to "direct taxes." "Duties" and "imposts" are taxes levied upon articles imported from foreign countries. An "excise" is an inland tax generally imposed upon manufacturers, but sometimes upon consumption and upon retail sales. See *Constitution of the United States of America*, Annotated (1924), 77.

<sup>6</sup> *The Federalist*, No. 31.

powers bestowed upon the legislative body of a "more perfect union." Under this power <sup>7</sup> Congress has raised through taxation billions of dollars for the support of the government, averaging for the past several years more than four billions of dollars for each fiscal year.

This general taxing power <sup>8</sup> Congress, however, is subject to limitations. The Constitution contains four specific limitations upon the right of Congress to levy taxes; two additional have been derived by the Supreme Court under its authority to pass upon the constitutionality of congressional enactments. In the first place, under the constitutional limitations, Congress must levy taxes for certain purposes: "to pay the debts and provide for the common defense and general welfare of the United States." The restriction of levies to the payment of the debts of the nation and to provisions for its defense is a much more definite limitation than is indicated by the "general welfare." The "general welfare" clause has been held to restrict taxation to a public purpose, but Congress enjoys the widest discretion in determining what constitutes a public purpose. The term "debts" has been construed by the Supreme Court to include even a moral claim against the government. The court said that an act of Congress "recognizing such a claim and appropriating money for its payment can rarely, if ever, be the subject of review by the judicial branch of the government."<sup>8</sup> This means that the discretion of Congress is practically final in determining the scope of taxation intended to promote the general welfare. Under this doctrine Congress has raised and expended vast sums of money in aiding institutions of higher learning, in building the Panama Canal, in maintaining a system of national parks, and in constructing vast irrigation works in the western states.

In the second place, the taxing power is limited by the constitutional requirement that indirect taxes shall be uniform;<sup>9</sup> that is, that all duties, imposts and excises shall be levied under the same classification and at the same rate of assessment throughout the United States. An import duty upon woollens must be the same

<sup>7</sup> This grant of power, of course, has been made more effective in regard to direct taxes, which are required to be apportioned by a subsequent constitutional limitation (Art. I, Sec. 9, Cl. 4), by the passage of the Income Tax Amendment which requires no apportionment of income taxes.

<sup>8</sup> *United States v. Realty Co.* (1896), 163 U. S. 427. See also *Burdick*, *op. cit.*, 182.

<sup>9</sup> *The Constitution*, Art. I, Sec. 8, Cl. 1.



for the port of New York as for the port of San Francisco; an excise tax upon tobacco must be the same in respect to classification and rate of assessment in the various localities in which the tax is intended to operate. The Constitution thus requires geographical, as opposed to intrinsic uniformity.<sup>10</sup> "Throughout the United States," however, does not include Porto Rico and the Philippine Islands; commodities introduced into the country from these island possessions may be taxed in such manner as Congress may determine.<sup>11</sup>

The third constitutional limitation upon the taxing power of the national government is that direct taxes shall be apportioned among the several states upon the basis of their respective numbers.<sup>12</sup> It was the evident intention of the Framers of the Constitution that direct taxes would be used only in case of necessity and that the rule of apportionment would prevent a majority from certain states from imposing an unjust direct tax upon the people in other states. Consequently, under this limitation, Congress would have to determine the total amount to be raised through direct taxation and then apportion it among the states upon the basis of their population. It is evident that the character of this limitation would depend upon the meaning given to direct taxes. What has been the history of judicial interpretation of this phrase?

In 1796 the Supreme Court suggested that "the direct taxes contemplated by the Constitution are only two, to wit, a capitation or poll tax, simply, without regard to property, profession, or any other circumstance, and a tax on land."<sup>13</sup> Under the then prevailing economic system this dictum of the court was doubtless a logical interpretation of the constitutional grant. However, when Congress passed an income tax law in 1862 without providing for its apportionment, the act was attacked on the ground that an income tax was a direct tax and, therefore, valid only if apportioned according to the constitutional rule. The Court, nevertheless, holding to the distinction previously laid down, sustained the authority of Congress to levy such a tax without apportionment.<sup>14</sup> Later the act of 1862 was repealed, but in 1894 Congress passed another income tax law similar to the previous act and it was likewise attacked on the same grounds as the act of 1862. This time the

<sup>10</sup> *Knowlton v. Moore* (1900), 178 U. S. 41.

<sup>11</sup> *The Insular Cases* (*De Lima v. Bidwell*, *Downes v. Bidwell*, *Dooley v. United States*) (1901), 182 U. S. 1, 222, 244.

<sup>12</sup> Art I, Sec. 2, Cl. 3.

<sup>13</sup> *Hylton v. United States* (1796), 3 Dallas 171.

<sup>14</sup> *Springer v. United States* (1880), 102 U. S. 586.

Court, overruling the decision rendered fifteen years before, held that taxes upon income from real estate or personal property, as well as poll taxes and taxes upon land, were direct taxes and, therefore, subject to the constitutional rule of apportionment.<sup>15</sup>

The general increase in the expenses of the national government together with the rather limited sources of its income, made the effects of this decision far reaching. The immediate result was an agitation for a constitutional amendment giving Congress the power to tax incomes. It was not until 1909, however, that the Congress took steps in this direction by proposing the Sixteenth Amendment, which was ratified by the requisite number of states by 1913, and which grants Congress the power "to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."<sup>16</sup> Many questions have arisen concerning the extent of this power since it was apprehended by some that it gave Congress an unlimited authority over incomes. Under judicial construction, however, it has been held that this amendment does not extend the taxing power to new or excepted subjects, but merely removes income taxes from the class of direct taxes that have to be apportioned among the states on the basis of population.<sup>17</sup> Congress, therefore, is still without the power to levy an income tax upon the revenue derived from state and municipal bonds, issued in their governmental capacity, since such bonds were exempt from federal taxation before the passage of the Sixteenth Amendment.<sup>18</sup>

The only positive prohibition against congressional taxation is found in the constitutional clause that provides that "no tax or duty shall be laid on Articles exported from any State."<sup>19</sup> In

<sup>15</sup> *Pollock v. Farmers' Loan and Trust Co.* (1895), 157 U. S. 429; 158 U. S. 601. The latter report was a rehearing of the case in which the rule as to income from land was extended to include that from personal property also.

<sup>16</sup> *The Constitution*, Amendment 16.

<sup>17</sup> *Brushaber v. Union Pac. R. R. Co.* (1916), 240 U. S. 1; *Evans v. Gore* (1920), 253 U. S. 245.

<sup>18</sup> See letter of A. W. Gregg, an expert in the Treasury Department, to Rep. W. R. Green, Jan. 4, 1924, *Congressional Record*, Vol. 65, pt. 8, 8204-8206, reprinted in J. M. Mathews and C. A. Berdahl, *Documents and Readings in American Government* (1928), 398-405. In 1925 an amendment to prohibit the issuance of tax-exempt securities was introduced in the House of Representatives but was never reported from committee. The text of the proposed amendment may be found in R. L. Mott, *Materials Illustrative of American Government* (1925), 69.

<sup>19</sup> *The Constitution*, Art. I, Sec. 9, Cl. 5.

general, a tax to come within this prohibition must be imposed upon goods by reason of their actual exportation; the intended exportation of articles from a state does not invalidate a general tax laid on all property alike.<sup>20</sup> An annual tax, furthermore, upon the entire income of a corporation accruing from all sources is not invalid under this clause in so far as it applies to income derived by a corporation from its export trade.<sup>21</sup> Except by taxation, Congress may regulate exports in any way it sees fit.

2. *Implied Limitations from Judicial Decisions.* In addition to the constitutional limitations upon the power of taxation exercised by Congress, implied limitations have been declared by the courts. As early as 1819 the Supreme Court in the celebrated case of *McCulloch v. Maryland* held that, from the nature of our federal system in which each government had the constitutional right of self-preservation and since the power to tax is the power to destroy, it followed that the states could not impede the operations of the federal government through their power of taxation.<sup>22</sup> Later this rule was extended to the taxation of state instrumentalities by the federal government, denying to the latter the right to tax the salaries of state officials<sup>23</sup> or the bonds of the state or any of its subdivisions issued in their governmental capacity.<sup>24</sup>

In the Child Labor Tax Case of 1922, moreover, the Supreme Court declared the Child Labor Tax Law of 1919, which imposed a tax upon the profits of persons or corporations using the services of children within certain ages, unconstitutional on the ground that it was an attempt by Congress to use its taxing power to regulate matters which were exclusively reserved to the states.<sup>25</sup> Thus Congress, under this decision, cannot, even in an act purporting to raise revenue, invade the field of powers reserved to the states if it is evident that its motive is regulation instead of the raising of revenue.

3. *General Extent of Federal Taxing Powers.* With the exception of the limitations given above Congress is free to choose the objects or persons subject to taxation and to determine the amount

<sup>20</sup> *Turpin v. Burgess* (1886), 117 U. S. 504; *Cornell v. Coyne* (1904), 192 U. S. 418.

<sup>21</sup> *Peck & Co. v. Lowe* (1918), 247 U. S. 165.

<sup>22</sup> 4 Wheaton 316.

<sup>23</sup> *Collector v. Day* (1870), 11 Wallace 113.

<sup>24</sup> *Pollock v. Farmers' Loan & Trust Co.* (1895), 157 U. S. 429; 158 U. S. 601; *Ambrosini v. United States* (1902), 187 U. S. 1.

<sup>25</sup> *Bailey v. Drexel Furniture Co.* (1922), 259 U. S. 20. For a criticism of the decision in this case, see Edward S. Corwin, "The Child Labor Decision," *New Republic*, July 12, 1922.

to be raised by the various kinds of taxes imposed. From time to time, however, there have arisen questions concerning the power of Congress to tax for the purpose of regulation; especially with reference to the use of the taxing power as a basis for police regulations. The history of these regulations, in which Congress has used the power of taxation beyond the mere purpose of raising revenue, with the interpretations placed upon them by the Supreme Court, serves best to show the present extent of the taxing power of the national legislative body.

Subject to the constitutional restrictions, a tax law can never be attacked if its sole purpose is to raise revenue. Congress, however, has seen fit to use the taxing power, not only to raise revenue, but also to prohibit certain practices upon the part of individuals and corporations which it deemed injurious or inadvisable. It has, through the enactment of tariff laws, prevented the introduction into this country of articles manufactured abroad which would compete with similar products made in America, and in no instance was the major purpose of such legislation to raise revenue. Furthermore, the national bank act of 1866, levying a prohibitive tax of ten per cent upon state bank notes in order to protect the notes of the newly established national banks against state competition, received judicial approval.<sup>26</sup> Moreover, a prohibitive tax on yellow oleomargarine and a Narcotic Drug Act which placed a small tax on registered dealers and required a certain procedure of sale to be followed were upheld by the Supreme Court on the ground that the main purpose of these acts was shown on their face to be the raising of revenue.<sup>27</sup> In like manner the federal government in 1912 placed a prohibitive tax upon phosphorous matches which as yet has not been contested in the courts. But, as has been pointed out, when the national government attempted to regulate child labor by taxing the products manufactured by children, of certain ages, the Court went behind the motive of Congress for the first time and declared the act unconstitutional, as an invasion of a field of power reserved to the states. In this decision the Court called a halt to the increasing number of acts which were designed to regulate matters through the taxing power. What, then, it may well be asked, is the extent of the power of Congress to regulate and prohibit under its taxing power? From the adjudicated cases, it may be concluded that Congress may use

<sup>26</sup> *Veazie Bank v. Fenno* (1869), 8 Wallace 533.

<sup>27</sup> *McCray v. United States* (1905), 195 U. S. 27; *United States v. Doremus* (1919), 249 U. S. 86.



this power when the end is the raising of revenue or when its purpose is the execution of another delegated power, as in the case of the tariff or the taxation of state bank notes in which instances Congress might have used its power over commerce and its general fiscal powers to effect the same result. Moreover, the courts will not inquire into the legislative motive unless the act on its face shows that it was not intended for revenue, as in the Child Labor Case. Furthermore, a prohibitive tax may be levied not only when it is necessary to secure the federal government in the exercise of its delegated powers, but also when the business taxed is one that cannot be pursued as of constitutional right, such as the tax on yellow oleomargarine. If the act, however, shows on its face that it is not a revenue measure and is not a means of exercising some other delegated power, but instead is an attempt to regulate a matter over which Congress has no control, then the courts will declare it null and void.<sup>28</sup>

#### IV. THE YIELD OF TAXES IN THE UNITED STATES

From the establishment of the national government in 1789 through the first decade of the twentieth century, the chief reliance of the United States for the raising of revenue has been placed upon indirect taxes, with direct taxes being left to the states. Customs duties, furthermore, formed the largest part of the revenue derived from indirect taxation. The total ordinary receipts of the government from 1789 until 1910 amounted to something over twenty billions of dollars, of which eleven came from customs, eight from internal revenue, and only twenty-eight millions from direct taxes.<sup>29</sup> Furthermore, until the Civil War, excise duties had been imposed only in cases of emergency, from 1791-1802 and 1813-1818, and import duties were adopted as the main source of financial supplies. In the five year period from 1813-1818 excise taxes yielded only \$15,000,000 as compared to \$93,000,000 from customs duties.<sup>30</sup> The Civil War, however, created a financial crisis, and the national government had to revert to internal taxation upon a large scale to derive sufficient revenue to pay its expenses. Taxes, therefore, were placed upon domestic industry and trade; and although the amount and kinds of taxes have varied

<sup>28</sup> For an excellent discussion of the federal taxing power, see Walter Thompson, *Federal Centralization* (1928), Ch. IV.

<sup>29</sup> A. C. McLaughlin and A. B. Hart, *Cyclopedia of American Government* (1914), II, 6.

<sup>30</sup> *Ibid.*, III, 212.

since that time, no attempt has been made to dispense with this recognized mode of taxation. In 1870 the Civil War rates were lowered and some were abolished, but during the Spanish-American War new and higher duties were levied. In 1909 a special excise tax was placed upon the net profits of certain corporations, and in 1913 the Income Tax Law was passed by Congress under the Sixteenth Amendment. During the period of the World War, 1914-1918, the peak in national taxation was reached. Customs duties naturally decreased following the outbreak of the war, resulting in an increase of excise taxes and their extension to include an inheritance tax, stamp taxes, and a progressive tax upon excess profits. Thus, internal taxation became the main source of revenue and doubtless a permanent part of our financial policy.

An indication of the principal sources of revenue relied upon by the national government may be gathered from the reports of the Secretary of the Treasury. During the fiscal year of 1927, the total ordinary receipts of the government amounted to \$4,128,422,-887.61 and the public debt receipts totaled \$5,185,083,142.93. Of the ordinary receipts, against which expenditures are chargeable, 54% came from the income and profit taxes levied upon corporations and individuals; 15% from miscellaneous internal revenues which included the tobacco and automobile taxes, the estate tax, and other minor levies; 15% from customs duties; 5% from the proceeds from foreign obligations; and 11% from "all other" sources, consisting of public domain receipts, profits from coinage and bullion receipts, fees, fines and penalties, interest on public deposits, receipts from revenues of the District of Columbia and from the administration of trust funds, and smaller items. Postal revenues during this fiscal period amounted to \$683,121,988.66.<sup>31</sup>

It is evident that when the national government levies taxes on incomes and profits, inheritances, and corporations the possibility of double taxation, under our dual system of government, increases. Furthermore, with the mounting expenditures of our national and state governments there is no indication that double taxation can be avoided. Although the constitutionality of such procedure is not questioned, it is, on the whole, an unsatisfactory arrangement. This problem calls for the drawing of a line of federalism in taxation delimiting the fields of taxation for the national and state governments. This is necessary to preserve each wing of our federalism in its full vigor and to enable it to function efficiently.

<sup>31</sup> *Annual Report of the Secretary of the Treasury* (1927), 5 ff., 423 ff.

## V. REVENUE LEGISLATION

In order to provide legal means by which funds may be raised by the national government, revenue laws are enacted by Congress. The Constitution provides that "all bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills."<sup>32</sup> Since there is no constitutional provision for executive leadership in the framing of revenue legislation the responsibility rests with the House of Representatives and the Senate. Contrary to the former practice, there is now a single committee in each house charged with the framing of revenue measures. In the House of Representatives the Committee on Ways and Means, consisting of fifteen majority-party members and ten minority-party members, performs this duty; in the Senate, the Committee on Finance is charged with this function. While the framers of the Constitution undoubtedly intended that the House of Representatives would have the chief responsibility in this matter, the actual operation of the system has not always been in accordance with this principle. The Senate under its unlimited amending power has often been able to dictate changes in our revenue laws, and in certain instances has taken the initiative in introducing bills which in effect were revenue measures.<sup>33</sup> Indeed, our entire fiscal procedure is so different from that employed in European countries that it warrants a brief description.

Revenue laws of the United States may be divided into two general classes: the first includes all internal-revenue acts, the income tax being the most important; the second includes those laws placing duties upon goods imported from other countries, known as the tariff acts.<sup>34</sup> Both classes of acts are considered matters of policy, and consequently become party measures of primary sig-

<sup>32</sup> *Constitution*, Art. I, Sec. 7.

<sup>33</sup> For an interesting discussion of the power of the Senate over bills for raising revenue and the use made by the Senate of this power, see L. Rogers, *The American Senate* (1926), 110 ff. One familiar method of the Senate, in using its amending power, is to strike out all provisions of the House bill below the enacting clause and to substitute the Senate bill drawn up by its Committee on Finance.

<sup>34</sup> It is interesting to note that some tariff acts have also contained taxes which were internal. The Act of 1909 included a provision levying a tax upon the net income of certain corporations. The Act of 1913 included the income tax law of that year. The usual method, however, is to pass the internal-revenue acts separately, as in 1926, and leave the tariff for duties upon imported goods.

nificance. Especially has the tariff been one of the great issues in American politics upon which the two major parties have differed. Paradoxically the financial aspects of revenue legislation are purely secondary.

The framing of any revenue measure is a difficult matter involving highly technical and statistical information; this is particularly true with tariff legislation.<sup>35</sup> In framing such legislation the Ways and Means Committee, and even the Senate Finance Committee, hold public hearings extending over several weeks upon the schedules into which the tariff is divided. In these public hearings witnesses representing the affected interests appear before the Committee and plead for a reduction or an increase in tariff duties. Each schedule is considered separately and as many as three hundred witnesses have been heard on a single schedule.<sup>36</sup>

After the House Committee hearings have been concluded, the majority members of the Committee divide themselves into a number of sub-committees in order to frame the different portions of the bill. The reports of these sub-committees constitute the basis of the report of the majority members of the Committee. As a formality the minority members are then called into a full meeting of the Committee for a final vote upon the report of the majority members of the committee. This vote usually indicates a strict party cleavage; hence, the minority members for partisan

<sup>35</sup> The present internal revenue system of the national government is formulated in the Revenue Act of 1926 as amended in 1928. This Act authorized the establishment of a Joint Congressional Committee on Internal Revenue Taxation of ten members equally divided between the Senate Finance Committee and the Ways and Means Committee of the House. This Committee was to investigate the operation, effect, and administration of the Federal system of internal-revenue taxes, and measures and methods for the simplification of such taxes, particularly the income tax. The Revenue Act of 1928 made changes which will cause an estimated net reduction of \$225,295,000. The corporation income tax was lowered from 13½ to 12%; an increase was made in the exemption granted to small corporations; the automobile sales tax was repealed; and the exemption in the tax on theatrical admissions was increased to three dollars. *The American Year Book* (1927), 195; A. W. MacMahon, "First Session of the Seventieth Congress," 22 *Am. Pol. Sci. Rev.* (1928), 661-663, 670.

<sup>36</sup> During January and February, 1929, hearings were conducted by the House Ways and Means Committee upon the fifteen schedules included within the present tariff. Schedule 15, known as the "Free List," had 288 witnesses listed to appear and present their views. To each witness an allotted time of five minutes was granted for the presentation of arguments. This revision of the tariff was conducted by Republicans who were likewise responsible for the Fordney-McCumber tariff act of 1922. This revision was presented to a special session of Congress called by President Hoover. For a good account of the testimony presented at these hearings, see *New York Times*, January-February, 1929.



purposes generally oppose the measure on the floor of the House. In 1913 the Democrats went so far as to submit the Underwood tariff to the Democratic caucus before its introduction in the House, but this has not been the prevailing practice.

The chairman of the Committee on Ways and Means makes an elaborate speech in presenting the tariff bill to the House, followed by the leader of the minority party who is the ranking minority member upon this Committee. This becomes the signal for a general debate which may last for several days or even weeks and in which practically every member may take part. The bill is then read in the Committee of the Whole under the five-minute rule for discussion and debate. Since the majority party is naturally in control, such debate usually accomplishes very little except to reemphasize the positions of the parties on the tariff question.

After passage in the House, the bill is sent to the Senate which ordinarily makes such sweeping changes in the measure as to require a conference committee to adjust the differences between the two houses. The conferees of the Senate largely control the action of the conference committee whose report is generally adopted by both houses without much debate.

Even though the framing of the tariff is of a highly technical nature and involves far-reaching economic consequences, only recently was there any attempt made upon the part of Congress to establish an agency to aid it in performing this task. In 1909 President Taft succeeded in getting a Tariff Board established for this purpose, but it soon aroused the hostility of Congress and appropriations for its maintenance were refused.<sup>37</sup> In 1916, however, at the suggestion of President Wilson, Congress established the present Tariff Commission, consisting of six members appointed by the President and Senate for a term of twelve years at an annual salary of \$7,500. To this Commission was entrusted the duty of investigating the administration of the tariff, its fiscal and industrial effects, and the tariff relations between the United States and foreign countries. It was, therefore, made a research agency of the government on all matters relating to the tariff and its findings are placed at the disposal of the President, the Committee on Ways and Means of the House, and the Committee on Finance of the Senate. It may also be requested to make addi-

<sup>37</sup> A. C. McLaughlin and A. B. Hart, *op. cit.*, III, 473-475, gives a summary of the important steps taken in the framing of tariff legislation under the old system.

tional investigations and reports by the President, or by either of the said committees, or by either branch of the Congress.<sup>38</sup> Greater commission powers would further eliminate the tariff from politics.

The investigatory and advisory powers of the commission were somewhat increased in 1922. At the present time the President, upon the recommendation of the commission, may proclaim such changes in classification or increases or decreases in rates of duty, within the limit of 50% of the existing rate, as may be necessary to equalize ascertained differences in costs of production of similar articles in the United States and in the principal competing foreign country. In addition, he may, upon its recommendation, proclaim new or additional rates of duty to offset unfair methods of competition and practices in the importation and sale of foreign articles or discrimination by foreign countries against the commerce of the United States.<sup>39</sup>

The outstanding defect in the present system of revenue legislation is the lack of responsibility. The Tariff Commission can only furnish information. A small minority of the majority party in the House frames such legislation and usually secures its adoption by the House. The Senate usually changes the House measure. The Secretary of the Treasury may have some influence in the process. The President plays his part. The lobby is behind the scene throughout the process. The result is a sort of crude mosaic which is far from a piece of scientific legislation and for which everybody and yet nobody is responsible. The process is too circuitous and complicated for the nation to understand. Responsibility, therefore, cannot be fixed.

## VI. COLLECTION OF REVENUE

The collection of the national revenue is mainly a function of the Department of Treasury and is performed by the Internal Revenue and the Customs Bureaus through their extensive organizations as explained under the department of treasury.<sup>40</sup> Rulings of the Secretary of the Treasury or the port collectors in regard to the classification and valuation of merchandise may be reviewed by the Customs Court, with further appeal to the

<sup>38</sup> 19 U. S. C. A., Ch. 2, Secs. 91-105.

<sup>39</sup> *Eleventh Annual Report of the Tariff Commission* (1927), 2.

<sup>40</sup> The Division of Customs and the special agency service were combined into the Bureau of the Customs in 1927. See *Annual Report of the Secretary of the Treasury* (1927), 92.

Court of Customs Appeals, and in certain cases to the Supreme Court.<sup>41</sup> Miscellaneous revenues, such as fees and fines in the courts, proceeds from the sale of government property, postal revenues, and income from the mint are collected directly by the agencies concerned.

The collection of the revenues of the government of the United States is a tremendous task. The customs receipts for the fiscal year ending June 30, 1927, were \$605,672,465.<sup>42</sup> The internal revenue receipts for the same period were practically three billions of dollars. The money and securities of the government are kept in the treasury vaults at Washington, in the federal reserve banks, and in designated national banks. Payments are made from these funds only upon the issuance of proper warrants.

<sup>41</sup> L. F. Schmeckebier, *The Customs Service* (Service Monographs of the United States Government, No. 33, 1924), Chs. III and IV. See also the chapter on the organization of the national judiciary.

<sup>42</sup> *Annual Report of the Secretary of the Treasury* (1927), 112.

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## CHAPTER XXIII

### NATIONAL EXPENDITURES AND BANKING

#### I. THE GROWING COST OF GOVERNMENT

A brief description has been given of the processes involved in the raising of revenue for the support of our national government. Paralleling the revenue side of our fiscal relations are expenditures which in government, as well as in business, give a true picture of its multifold activities. As the functions of government expand, new machinery must be established and thousands of dollars, even millions, must be added to the annual appropriation bills.<sup>1</sup> The increasing cost of the government of the United States from its foundation to the close of the first quarter of the twentieth century is well illustrated by the following table:<sup>2</sup>

YEAR	RECEIPTS	EXPENDITURES
1791 .....	\$ 10,301,765	\$ 7,283,936
1825 .....	28,146,913	24,814,848
1850 .....	53,149,374	48,411,772
1865 (Civil War) ....	1,804,919,923	1,902,729,793
1880 .....	454,051,106	587,946,244
1900 .....	686,953,491	662,094,856
1910 .....	931,314,666	948,181,289
1915 .....	1,004,145,947	1,069,785,174
1917 (World War) ..	3,876,868,711	3,083,476,791
1919 .....	34,076,690,541	35,151,867,953
1921 .....	14,912,934,104	14,139,993,973
1923 .....	11,729,602,078	11,733,203,067
1925 .....	7,359,698,805	6,967,600,198

In the fiscal year ending June 30, 1927, the total expenditures of the national government including Postal Service payable from postal revenues amounted to \$9,975,157,977.15, of which, however, only \$3,493,507,876.75 were chargeable against "ordinary re-

<sup>1</sup> Henry Jones Ford, *The Cost of Our National Government* (1910), *passim*.

<sup>2</sup> Compiled from the *Annual Report of the Secretary of the Treasury* (1927), 458-461.

72  
56  
86

125  
56  
39



ceipts.”<sup>3</sup> Of this huge sum, 51.1% is for the service of the public debt, which includes 30% for debt retirements and 21.1% for interest payments; 31.8% for military functions, which include aid to war veterans and the cost of special agencies for strictly military purposes as well as the military expenditures of the War, Navy, and other departments; and 17.1% for ordinary civil functions which include 2.7% for the “general government,” 2% for internal security, 3.3% for development and regulation, 7.3% for the public domain, works, and industries, 1.4% for local government and Indians, and 0.4% for foreign relations.<sup>4</sup> The so-called “peace-time” activities of the general government, therefore, form a negligible part of the total of its expenditures. War and its concomitants take the heaviest toll. The ordinary receipts of the government for the fiscal year 1928 were \$4,042,348,156.19 and the expenditures were \$3,642,519,875.13.<sup>5</sup> From these statistics it may be concluded with reasonable certainty that the cost of the national government has increased from slightly more than seven million to a stabilized basis in times of peace of between three and four billion dollars.

## II. THE OLD METHOD OF MAKING APPROPRIATIONS

The Constitution grants to Congress complete control over the authorization of expenditures, since no money may be drawn from the Treasury but in consequence of appropriations made by law.<sup>6</sup> Consequently it is one of the chief duties of Congress to provide annually for the needs of the various governmental agencies. In doing this, appropriations are made in three different forms: (1) annual, which are the most common; (2) permanent specific appropriations, which are made for definite ends but remain available until the money is spent, as in the case of public works; and (3) permanent annual appropriations which, although they do not require the annual vote of Congress, rest upon the previous enactment of laws relating to the fundamental functions of the govern-

<sup>3</sup> *Ibid.*, 443-444. It should be noted that reports of the Secretary of the Treasury upon receipts and expenditures are made upon several bases as warrants issued, checks issued, daily Treasury statements, revised and un-revised. There are naturally some differences in the results, depending upon the table relied upon, but these differences are negligible. See *ibid.*, 421, 422, 430.

<sup>4</sup> *Ibid.*, 16-18.

<sup>5</sup> *Message of the President of the United States Transmitting the Budget (1928)*, v.

<sup>6</sup> Art. I, Sec. 9, Cl. 7.

ment, as in the case of the collection of customs duties, payment of interest on a public debt, the requirement of a sinking fund, and the salaries of the judges.<sup>7</sup> The only constitutional time limitation on this power of Congress is that no appropriation for the army shall be made for a longer term than two years.<sup>8</sup> The history of the American system of appropriations may be divided into two general periods: (1) the system as it existed before the passage of the Budget and Accounting Act of 1921, and (2) the system as it exists today under the provisions of that act.

From the establishment of the government in 1789 until the institution of the budget system in 1921, a thoroughly irresponsible system of appropriations operated. The act establishing the Treasury Department made it the duty of its Secretary "to prepare and report estimates of the public revenue, and the public expenditure."<sup>9</sup> A Supplementary Act of 1800 made it his duty to lay before Congress a comprehensive report, containing estimates of the public revenue and expenditure and suggestions for the improvement of the finances of the government. "Unfortunately," says Willoughby, "Hamilton's attempt to exercise such powers and to give the office of Secretary of Treasury the functions and responsibilities of the British Chancellor of the Exchequer was unsuccessful, partly because of congressional jealousy of the Executive, partly because of party divisions, and partly because the structure of the new government did not lend itself to such development."<sup>10</sup> The Secretary, therefore, became a mere agent for the transmissal of estimates of expenditures to Congress. The spending agencies prepared their own estimates and transmitted them to the Secretary who compiled them into a Book of Estimates, which was presented to Congress. Over the preparation of these estimates the Secretary had no control; he merely served as the official compiler of the requests made by the various spending agencies. Furthermore, the ~~President~~ was not regarded as a factor in this process; in fact, it was not until 1909 that Congress provided that, in the event estimated appropriations exceeded estimated revenues, the Secretary of the Treasury was to transmit a detailed statement of this fact to the President, who might, in giving Congress information on the state of the Union, advise it as to the best method of bringing appropriations within the estimated revenues. Decentralization of

<sup>7</sup> A. C. McLaughlin and A. B. Hart, *Cyclopedia of American Government* (1914), I, 60.

<sup>8</sup> *Constitution*, Art. I, Sec. 8, Cl. 12.

<sup>9</sup> *I Stat. L.*, 65.

<sup>10</sup> W. F. Willoughby, *The National Budget System* (1927), 5.

*Handwritten signature*

control and irresponsibility were, therefore, the chief earmarks of the procedure in the formulation of estimates of expenditure before 1921.<sup>11</sup>

Consideration of these estimates by Congress merely added to the general confusion in national finances. In the early years of our national existence, the Committee on Ways and Means handled the estimates of appropriations as well as those dealing with revenue. In 1865, however, due to the development of serious objections to this concentration of power in the hands of a few men, the House of Representatives created the Committee on Appropriations, relieving the Ways and Means Committee of this function. In the course of time, the Committee on Appropriations became the object of jealous attacks which resulted in the curtailment of its powers and the granting to other committees of the right of introducing appropriation bills.<sup>12</sup> As finally developed there were eight distinct committees in the House of Representatives, and an equal number in the Senate, each acting independently of the others, which shared the power of reporting fourteen separate appropriation bills. These bills appeared before the House at different times without any attempt to coördinate the work of the several committees. Since the House and Senate usually differed over the proposed amounts, the conference committee became an important agent in financial procedure. This committee went so far as to insert new items in appropriation bills and to eliminate others which had been agreed upon by the two houses. Secret agreements, undue influence upon the part of certain governmental officials, and compromises determined the final character of appropriations. The President, moreover, since he did not possess the item veto, could hardly afford to veto a large appropriation bill for the purpose of rejecting some rider or objectionable provision attached to the bill. As a result he had to watch, possibly with regret, the political juggling of the people's money.

The defects in such a system of financial procedure are obvious. No single agency stood responsible for the formulation of estimates; consequently no financial program could be devised. The diffusion of responsibility among several committees in each House of Congress made log-rolling, pork-barrel legislation, and trades the order of the day. Each spending agency sought the maximum appropriation before its "friendly" committee in Congress; and in case of refusal was frequently accommodated by some other com-

<sup>11</sup> See *ibid.*, 6-12.

<sup>12</sup> McLaughlin and Hart, *op. cit.*, I, 59.

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mittee. After the appropriations were made there was no effective check upon their expenditure. Running through the entire system there was a conspicuous absence of leadership and business principles and methods. As the functions of the government expanded and taxation increased to meet its mounting expenditures, a movement for reform began to assert itself.<sup>13</sup>

### III. THE MOVEMENT FOR A NATIONAL BUDGET

Public opinion for many years condoned such a system because the burden of federal taxation was light and the national treasury seemed inexhaustible. During the first decade of the twentieth century, however, as the financial burden of government began to increase, interested organizations of citizens began to demand efficiency and economy in the conduct of public affairs, whether national, state, or local. In the national government this idea was championed by President Taft, who secured from Congress an appropriation for the appointment of a commission to study the administrative branch of the government for the purpose of making suggestions for the introduction of more business-like methods.

The result was the appointment of the Commission of Economy and Efficiency in 1910, which, after three years of investigation, made two reports in which it recommended the establishment of a national budget system under the control of the President.<sup>14</sup> Congress paid little attention to its recommendation. With America's entrance into the World War, however, a new problem arose. For the first time the national government was facing a serious financial crisis. Whereas millions of dollars had been spent before, billions were now required. Congress at last realized that order must be substituted for chaos. At the suggestion of President Wilson, Congress passed a budget act in 1919, which to the surprise of all was promptly vetoed by the President because of a provision which limited his power of removal of the Comptroller General. In 1921, however, the Budget and Accounting Act became a law under the signature of President Harding. Government finances had been placed, for the first time, upon a sound basis,<sup>15</sup> and the European practice of executive initiative in financial regulation had definitely been adopted.

<sup>13</sup> Willoughby, *op. cit.*, Ch. II.

<sup>14</sup> See the chapter on the Reorganization of National Administration for more detailed discussion of the work of the Commission.

<sup>15</sup> Willoughby, *op. cit.*, Ch. III.



## IV. THE BUDGET AND ACCOUNTING ACT OF 1921

This act established two important agencies of national administration: (1) the Budget Bureau and (2) the General Accounting Office. The former is the agent of the President in the administration of financial affairs; the latter is the agent of Congress in supervising the financial transactions of the administrative officials of the government. Both, however, were created for the same purpose: to institute a sound, business-like financial procedure in the management of the financial affairs of the government in the interest of economy and efficiency.

1. *The Budget Bureau.* By the Act of 1921 the President is charged with the sole responsibility for the formulation of estimates and their presentation to Congress. For the purpose of aiding him in this duty, a Budget Bureau was created, consisting of a Director and an Assistant Director appointed by the President without term and subject to removal at his pleasure. In general the Bureau is organized by the Director subject to the rules and regulations laid down by the President.<sup>16</sup> Although technically the Bureau was placed in the Treasury Department, it is not subject to control by the Secretary of the Treasury; on the other hand, it serves as the agent of the President solely and actually may be considered as belonging to his Office. It is absolutely under his control and should be legally attached to his office.

By the terms of the Act<sup>17</sup> the President is required to submit to Congress on the first day of each regular session, the budget which shall show in summary and in detail (1) the estimates of expenditures necessary for the support of the government for the ensuing fiscal year;<sup>18</sup> (2) estimates of the receipts of the government during the ensuing fiscal year to be derived from the present revenue laws and the new proposals contained in the budget; (3) the expenditures and receipts of the government during the last completed fiscal year; (4) estimates of the expenditures and receipts of the government during the fiscal year then in progress;

<sup>16</sup> At the present time there are thirty-eight employees of the Budget Bureau. When the salary of an employee is \$5000 or less he must be appointed in accordance with the civil service laws and regulations. This same rule applies to the General Accounting Office. Willoughby, *op. cit.*, 41.

<sup>17</sup> 31 U. S. C. A., Ch. I, Secs. 11-58.

<sup>18</sup> Estimates for the legislative branch and the Supreme Court are transmitted to the President and are included by him in the Budget without revision. This provision shows a deference to the principle of separation of powers. The fiscal year of the United States Government begins on July 1. Congress meets in regular session on the first Monday in December.

(5) balanced statements showing the actual condition of the Treasury at the end of the last completed fiscal year, and the estimated condition at the end of the fiscal year then in progress and of the ensuing fiscal year under the budgetary proposals; and (6) all essential facts regarding the bonded and other indebtedness of the government. Should the estimated expenditures of the government exceed the estimated revenue, or vice versa, the President is to recommend such measures as he deems necessary for the balancing of the budget. In order to centralize responsibility more definitely, the Act also provides that no department officers or employees shall submit estimates of appropriations directly to Congress except at the request of either House. Supplemental or deficiency estimates must also be submitted by the President.

2. *Preparation of the Budget.* The actual work of preparing the budget is entrusted to the Budget Bureau. Following the forms prescribed by the President, each spending agency through its designated budget officer submits its estimates to the Budget Bureau by September 15, which has the power to "assemble, correlate, revise, reduce or increase the estimates of the several departments or establishments." The actual process of preparing the budget, which was established by the President upon the recommendation of the Bureau, may be summarized as follows: (1) the President in conjunction with the Director of the Budget formulates his financial policy in which he fixes the general limits of the budget; (2) this policy is then communicated to the Business Organization of the Government, which consists of the Director and chief administrative officials of the government;<sup>19</sup> (3) following this statement, the Director of the Budget gives to the spending agencies such information as will enable them to carry out the President's wishes; (4) the spending agencies then submit, usually around July 15 of each year, detailed preliminary estimates which are scrutinized carefully by the Board of Estimates of the Budget Bureau and tabulated in order to obtain the maximum amount requested; (5) after this study of the preliminary estimates is made, each spending agency is advised as to the maximum amount it may hope to secure under the new budget; (6) each agency then revises its preliminary estimates and submits this revision to the

<sup>19</sup> For the purpose of creating a financial *esprit de corps* among the heads of departments, bureaus, and other agencies situated in Washington, the "Business Organization of the Government" has been formed. This body meets twice each year, in January and June, and addresses are made by the President and the Director of the Budget, in which financial co-operation in administering the budget is urged.

Budget Bureau by September 15 according to law; (7) these revised estimates are studied by the Bureau through special investigations and hearings as a means of adjusting the differences between the Budget Bureau and the spending agencies in which process the word of the Director of the Budget is final if supported by the President; (8) the final estimates are then tabulated, summarized, and submitted for the consideration of the President; the President's action in the form of approval with or without changes completes the preparation of the budget. The budget document, which consists of around 1,400 large pages, is then prepared by the Budget Bureau and presented to Congress by the President with his budget message.<sup>20</sup>

3. *Consideration of the Budget by Congress.* In order to harmonize procedure in Congress with the evident intention of the Budget and Accounting Act of making the President's requests the basis of congressional action, the House in 1920 and the Senate in 1922 reorganized their committee systems.<sup>21</sup> Under the present rules there is only one appropriations committee in each house which has jurisdiction over all appropriation proposals. The House Committee consists of thirty-five members, twenty-one belonging to the majority party and fourteen to the minority; the Senate Committee contains eighteen members, divided between the parties on a ratio of ten to the majority and eight to the minority. When the President's budget reaches Congress, it is first considered by the Committee on Appropriations of the House.<sup>22</sup> This committee, in fact, divides itself into ten sub-committees to each of which is assigned one of the ten major appropriation bills for consideration. These sub-committees may even begin hearings on appropriations before the President's budget is submitted.<sup>23</sup> In this way the committee acquaints itself in general with the needs of the spending agencies of the government before the President delivers his budget message. This committee has the power to change the budget in any way it sees fit. After the hearings have been concluded its

<sup>20</sup> Willoughby, *op. cit.*, Ch. VIII. For a brief description of the steps taken in the preparation of the budget for 1928, see *American Year Book* (1927), 199-200.

<sup>21</sup> Willoughby, *op. cit.*, Ch. IV, Appendices 3 and 4. It is interesting to note that the Senate, in its rules, provides that three members of each committee which formerly had charge of appropriations shall sit with the central committee when it is considering appropriations for those matters formerly entrusted to that committee. The House Rules contain no such provision.

<sup>22</sup> If the budget contains any revenue proposals, these are referred to the Committee on Ways and Means.

<sup>23</sup> *American Year Book* (1927), 200.

report is made to the House. Debate then takes place in the Committee of the Whole where any member may propose the changes he desires. After consideration in this committee has ended, the final ten appropriation bills are reported to the House and passed. In the Senate substantially the same procedure is followed. After passage by the Senate a conference committee adjusts such differences as arise between the two houses over the amount of money to be allotted to the several agencies. The appropriation bills, showing appropriations in detail in contrast to European practice, are then presented to the President for his signature.

It is evident from the foregoing discussion that Congress does not consider the budget system as a limitation upon its financial powers. The value of the system depends upon the degree to which Congress accepts the budget as evidence of a sound financial program. Has Congress, then, accepted it as such? If the budgets of 1923, 1924, 1925, and 1926 are taken as examples, the following conclusions may be reached. In each case the House Committee on Appropriations recommended a decrease in the amount requested by the budget, but in a majority of instances this decrease was negligible. Moreover, the House made a negligible increase over the recommendations made by its committee. The Senate uniformly increased, usually to a small extent, the appropriations recommended by the House. In each instance the amount of appropriations was less than the budget requested, ranging from 312 millions in 1923 to 9 millions in 1925.<sup>24</sup> On the whole, then, it may be said that Congress follows the recommendations of the President rather closely; especially is this true with the current running expenses of the spending services. It is only in regard to those appropriations involving matters of policy in respect to the character and scope of the activities of the government that Congress is inclined to follow its own judgment, but even in such matters deference is paid to the maximum limits suggested by the President for the total of governmental expenditures.<sup>25</sup>

Although many economies have been effected by the Budget Bureau and more effective control over the various spending agencies of the government has been established, certain reforms in the present system would make it even more effective. In the first place, Congress should place some limitation upon its own powers in dealing with the budget. A hostile Congress could easily wreck the best laid plans of the President in the matter of finances.

<sup>24</sup> Willoughby, *op. cit.*, 145.

<sup>25</sup> *Ibid.*, 152.



Furthermore, since according to experience it may be assumed that each spending agency will always ask for even more than it expects to receive, there is no reason why Congress should increase any proposal in the budget. For these reasons a simple rule of procedure limiting Congress to the criticism, reduction, and elimination of items in the budget proposals would make for economy and efficiency. In the second place, the budget comes from the hands of the executive as an executive policy. Those who have made the budget know best how to explain it. Hence, the heads of departments and the Director of the Budget should be given seats in Congress with the privilege of defending their recommendations, but without the right to vote. Moreover, the President should by constitutional amendment be given the power to reduce or veto items in appropriation bills as a means of protecting his recommendations and preventing administrative officials from lobbying with Congress for increases for their departments or agencies.<sup>26</sup> These reforms would really make executive responsibility for the financial policy of the government effective.

4. *Executive Control over the Administration of the Budget.* The law creating the Budget Bureau went further, however, than merely establishing a central agency for the preparation of estimates. In addition, it provided that the Bureau, when directed by the President, should make a detailed study of all departments and establishments "for the purpose of enabling the President to determine what changes (with a view of securing greater economy and efficiency in the conduct of the public service) should be made in (1) the existing organization, activities, and methods of business of such departments or establishments, (2) the appropriations therefor, (3) the assignment of particular activities to particular services, or (4) the regrouping of services."<sup>27</sup> These reports are to be transmitted to the President who may submit them with recommendations to Congress. By means of such powers, the Bureau has been able to devise and maintain an effective supervision over the administration of the budget. Under orders issued by the Director, the budget is apportioned to the different spending agencies which are required to make quarterly reports to the Bureau on the expenditure of their apportionments. Each agency, furthermore, is required to establish a small reserve of 1 to 5% of its total appropriations to meet emergencies. This reserve can

<sup>26</sup> At the present time the governors of 38 states possess the item veto for appropriation bills.

<sup>27</sup> 31 U. S. C. A., Ch. 1, Sec. 18.

only be used with the permission of the Director of the Bureau.<sup>28</sup> A definite case must be established to invade these reserves.

In addition to the control over the administration of the budget exercised by the Budget Bureau, the President has created from time to time through executive order a number of coördinating agencies whose function, in the main, is to assist in the execution of the budget. There is a Chief Coördinator in Washington, 9 Area Coördinators in as many districts into which the country is divided, and a number of coördinating boards and associations.<sup>29</sup> Each board is composed of a representative from the departments and establishments concerned with the activity under its jurisdiction. The main purpose of these boards is to coördinate the work of those agencies which perform related services, and thus to force in the interest of economy and efficiency a certain amount of coöperation in such matters as the disposition of surplus supplies. The work of these boards has gradually been expanding, and they have become, no doubt, a permanent part of the administrative machinery of the government. Through these agencies which have arisen since the establishment of the budget, a sound financial policy has been instituted for the national government which bids fair to be productive of untold good in the passing of years.

5. *Congressional Control over the Administration of the Budget.* Since Congress raises and appropriates the revenue of the national government, it is interested to see that it is spent for the purposes for which it was appropriated. The centralizing of financial control in the hands of the President made it necessary that Congress establish an agent to act as a check upon his control. Accordingly the Budget and Accounting Act created the General Accounting office under a Comptroller General appointed by the President and Senate for fifteen years and removable for certain causes only by

<sup>28</sup> *American Year Book* (1927), 202-203. Other money-saving devices have been suggested by Director Lord. Those agencies which omit filling vacancies arising during the fiscal year qualify for the "Two Per Cent Personnel Club." Furthermore, each of the 546,000 persons on the government pay roll is encouraged to save one dollar in his work. Those who accomplish this are made members of the "Loyal Order of Woodpeckers."

<sup>29</sup> Among these agencies may be mentioned the Permanent Conference on Printing, the Federal Real Estate Board, the Federal Purchasing Board, the Federal Liquidation Board, the Federal Traffic Board, the Federal Specifications Board, the Interdepartmental Board on Contracts and Adjustments, the Interdepartmental Board on Simplified Office Procedure, the Interdepartmental Patents Board, the Federal Board of Hospitalization, and the General Supply Committee. See Willoughby, *op. cit.*, Ch. XVII.

<sup>30</sup> 31 U. S. C. A., Ch. I, Secs. 41-58.

a joint resolution of Congress.<sup>30</sup> This officer is thus in his actions independent of the executive department. He is charged with the investigation of all matters relating to the receipt, disbursement, and application of public funds. No money may be issued from the treasury except upon his warrant, and no claims against the government can be finally settled except upon his approval. Although his control is largely of the post-audit type in the sense that he checks over the vouchers after payments have been made, yet his duty to report to Congress any violation of the appropriation laws serves as a deterrent force upon those who would fail to follow their provisions. He prescribes all forms and procedure for accounting in the several departments and establishments and for the examination of accounts of all fiscal officers. He is required to make an annual report to Congress in which he reviews the administration of the finances of the government and in which he may make recommendations for legislation dealing with the functions of his office. He is, therefore, a sort of official watch dog of Congress to see that the administrative officials do not divert the funds of the nation to illegal purposes. Although little has been done by this office in carrying out its powers, much good may be accomplished in the future.

## V. THE BORROWING POWER

It generally happens that during war or the construction of public works such as the Panama Canal, the ordinary revenues of the government are not sufficient to meet the enormous expenditures involved, and it is forced to borrow money to effect its purpose. In anticipation of such emergencies, the Constitution grants Congress the power "to borrow money on the credit of the United States" unhampered by any restrictions.<sup>31</sup> Consequently, Congress may borrow money in any amount that it pleases and dictate the terms upon which the debt may be repaid. The money which is thus borrowed constitutes the national debt. In 1853 the total gross debt of the United States amounted to \$59,000,000 but the Civil War increased it to something over two billions of dollars, which, however, had been reduced a billion dollars by 1916. In 1919, due to the World War and the Liberty Bond issues, the total debt reached the twenty-six billion-dollar mark.<sup>32</sup> Since 1920

<sup>31</sup> Art. I, Sec. 8, Cl. 2.

<sup>32</sup> *Annual Report of the Secretary of the Treasury* (1927), 514-515. The per capita debt has decreased from \$240 in 1919 to approximately \$150 at the present time. This figure is less than that of the important European

the annual average retirement of the debt has been \$834,000,000, which had by June 30, 1928, reduced the total debt to \$17,727,795,-837.91. This debt consists largely of interest-bearing bonds, treasury notes, certificates of indebtedness, and war-savings certificates.<sup>33</sup> The Treasury is following the policy of steadily reducing the debt by both the retirement of the principal and the refunding of the outstanding obligations from higher to lower interest rates.<sup>34</sup>

## VI. THE NATIONAL BANKING SYSTEM

To assist the national government in the borrowing of money, in the collection of revenues, and the keeping of its funds, Alexander Hamilton in 1791 recommended the establishment of a national bank, which recommendation was effected by Congress in that same year. This bank known as the Bank of the United States was given a twenty-year charter and was followed by a similar bank in 1816 chartered for the same period of time. Due to its mismanagement, the second bank aroused the hostility of many important interests, particularly the state banks, resulting in its constitutionality being tested before the Supreme Court. In the celebrated case of *McCulloch v. Maryland*, decided in 1819,<sup>35</sup> Chief Justice Marshall laid down the important doctrine of implied powers in upholding its constitutionality. However, when its charter expired in 1836 its friends were unable to re-establish it on account of the hostility of President Jackson; and as a consequence, once again the issue of paper money fell to the lot of state banks. During the Civil War, however, as a means of aiding the government in the sale of its bonds, a national banking system was established by the Act of 1863. To facilitate the accomplishment of the purpose of the act, it provided for a prohibitive tax upon state bank notes and granted to banks incorporated under its provisions the right to issue circulating notes free from taxation, provided such notes were secured by a certain amount of United States bonds bought and deposited in the Treasury at Washington. The result of this act was the creation of not only a market for government bonds but a uniform bank note issue. With amendments that

states. About \$10,000,000,000 of this debt consists of loans to foreign governments. Most of these debts have now been funded. See *ibid.*, 628.

<sup>33</sup> *Message of the President of the United States Transmitting the Budget* (1928), A94.

<sup>34</sup> *American Year Book* (1927), 205.

<sup>35</sup> 4 Wheaton 316.



have been added from time to time, this law has come to constitute the legal basis of the national banking system.

The national banking system as it operated prior to 1913 contained at least four outstanding defects:<sup>36</sup> (1) Decentralization was one of its weaknesses. There was no centralized control, and as a result each bank had to depend upon its own reserves in times of financial stress. Approximately 30,000 banking institutions were grouped into a headless system with practically no chance of co-operating in a crisis. (2) Inelasticity of credit was possibly its greatest defect. The rigid requirements of the law made it necessary for each bank to deposit Treasury bonds equal in par value to the notes issued; consequently, the amount of notes which could be issued depended finally upon the market price of government bonds, which often gave an inverse elasticity. In addition, the policy of rediscounting commercial paper was looked upon with disfavor. (3) Again, it lacked a proper clearing house mechanism for the handling of out-of-town checks. The poor exchange system between the banks made necessary the shipment of money from one part of the country to another. (4) Finally, it did not provide banking facilities for the national government. The Secretary of the Treasury apportioned the funds of the government among the sub-treasuries<sup>37</sup> and depository banks. In some instances large amounts of the money of the government were not drawing interest because they were in its own Treasury vaults. The defects of the system were emphasized by the financial crises of 1873, 1893, 1903, and 1907, and were remedied by the Federal Reserve Act of 1913.

1. *The Federal Reserve Banks.* This Act with later amendments,<sup>38</sup> provided for the establishment of a Federal Reserve Bank in each of twelve districts into which the country was divided.<sup>39</sup> The subscribed capital of not less than \$4,000,000 for each of these banks is held by member banks in its district. All national banks are required to join the system, and state banks and trust companies may do so upon fulfilling the requirements of the act. Each of the twelve reserve banks is managed by a board of

<sup>36</sup> R. J. Swenson, *The National Government and Business* (1924), 113, summarizing the defects given by E. W. Kemmerer, *A B C of the Federal Reserve System* (1920).

<sup>37</sup> These were abolished in 1921.

<sup>38</sup> 12 U. S. C. A., Ch. 3, Secs. 241-522.

<sup>39</sup> Federal Reserve Banks are located in Boston, New York, Chicago, Philadelphia, Cleveland, Richmond, Atlanta, St. Louis, Minneapolis, Kansas City, Dallas, and San Francisco.

directors consisting of six members elected by the member banks of its district and three appointed by the Federal Reserve Board at Washington, one of whom is designated as the Federal Reserve agent. While this board serves for only three years, the overlapping terms of its members make it a continuous body. Different interests must be represented in the membership of the board.

To increase the convenience and usefulness of these central banks, they are permitted under certain conditions to establish branch offices and at the present time twenty-three branch establishments are maintained. These banks must maintain reserves against their deposits and circulating notes. The member banks must keep on deposit with these reserve banks sufficient funds to protect both their demand and time deposits. This concentration of reserve money in each district makes it relatively easy to care for its financial needs and thus corrects one of the serious defects of the previous system. In other words a large sum of money is kept in each district and its mobility can take the direction of the needs of the district. A quick and easy shift of money to any bank in the district on which a run is being made may not only prevent its destruction but also restore and maintain public confidence in the integrity of our financial institutions.

Control over the Federal Reserve System is vested in the Federal Reserve Board, consisting of the Secretary of the Treasury and the Comptroller of the Currency *ex officio*, and six members appointed by the President with "due regard to a fair representation of the financial, agricultural, industrial, and commercial interests, and geographical divisions of the country." The appointed members serve for a term of ten years. This Board is charged with the general supervision of all the banks belonging to the system, including the examination of their accounts, the regulation of their reserves, the discounting of their paper, the fixing of their interest rates, and the issue and retirement of their notes. The flexibility of this regulation makes it possible for the board to adapt the system in accordance with its discretion to the financial needs of the various sections of the nation.<sup>40</sup>

The operation of the system since 1913 has met the expectation of its advocates that a stable, elastic, and efficient banking system

<sup>40</sup> 12 U. S. C. A., Ch. 3, Secs. 248-262. The Federal Reserve Board is aided by a Federal Advisory Council, made up of one member elected by the board of directors of each Federal reserve district for one year. It is the duty of this Council to make recommendations in regard to such matters as discount rates, rediscount business, note issues, and the reserve conditions in the various districts.

would result. In the first place its management is entrusted to experienced and successful bankers. In the second place, under government supervision a coöperation of the banking forces of the nation is secured which, in all probability, would never have resulted from voluntary agreement. In the third place an elasticity to credit is secured through rediscounting or short time collateral loans. Furthermore, there has been established a national clearing house which brings all links of the system into a single collecting agency. Finally, the banks in the system are required to serve as the fiscal agents of the government when they are needed and during the World War rendered invaluable assistance to the government in its financial operations. The services of the system have been such as to cause Congress by the McFadden Act of 1927 to give it an indefinite lease upon life.<sup>41</sup>

2. *Federal Land Banks.* The powers of the Federal Reserve System in regard to the discounting of commercial paper and the lending of money were designed to aid primarily the commercial and industrial interests in the United States. To meet the demands of the agricultural interests for long term and intermediate credit, Congress in 1916 through the Federal Farm Loan Act and in 1923 through the Agricultural Credits Act provided a separate banking system.<sup>42</sup> The Act of 1916 provided for the establishment of twelve Federal land banks in as many districts as the country was divided into.<sup>43</sup> The capital stock of these banks, \$9,000,000, was subscribed almost wholly by the national government. However, at the present time the combined capital of these banks is owned almost entirely by national farm loan associations,<sup>44</sup> of which there were 4,667 on June 30, 1927. In order to be able to borrow money from these banks, ten or more farmers, whose requests for loans must not total less than \$20,000, must form a national farm loan association, which guarantees the loan made to its members. All loans made by these banks are secured by first mortgages.

This act further provides that joint-stock land banks, with a minimum capital of \$250,000, may be organized by not less than ten stockholders. Such banks are private institutions for the investment of private capital, but they are under the supervision of

<sup>41</sup> *American Year Book* (1927), 320.

<sup>42</sup> 12 U. S. C. A., Ch. 7, Secs. 651-991.

<sup>43</sup> Federal land banks are found in Springfield, Mass., Baltimore, Md., Columbia, S. C., Louisville, Ky., New Orleans, La., St. Louis, Mo., St. Paul, Minn., Omaha, Neb., Wichita, Kan., Houston, Tex., Berkeley, Cal., and Spokane, Wash.

<sup>44</sup> *Annual Report of the Secretary of the Treasury* (1927), 76.

the Federal Farm Loan Board. The Agricultural Credits Act of 1923 provided for the establishment of intermediate credit banks in each of the cities having a Federal land bank. Each of these banks has an authorized capital of \$5,000,000 with a paid-in capital of \$2,000,000 and the right to call upon the Treasury for the additional \$3,000,000. Loans are made by these banks upon the basis of notes secured by warehouse receipts, shipping documents covering the products, or mortgages on livestock, on the way to market. Furthermore, national agricultural credit corporations may be organized by at least five persons, with a subscribed capital of at least \$250,000, for the purpose of providing credit facilities for the agricultural and live-stock industries.<sup>45</sup> These last associations are under the general supervision of the Comptroller of the Currency.

The administration of these acts is placed under the jurisdiction of the Federal Farm Loan Bureau, under the general supervision of the Federal Farm Loan Board. This Board is composed of seven members, including the Secretary of the Treasury *ex officio*, and six members to be named by the President and the Senate. Assessments are made on all banks organized under these acts to defray the salaries of the members of this Board.

## VII. CONTROL OVER THE CURRENCY

One of the greatest weaknesses of the Articles of Confederation was its failure to provide for a centralized control over the currency. To remedy this defect provisions were inserted in the Constitution giving Congress the power "to coin money, regulate the value thereof, and of foreign coin" and "to borrow money on the credit of the United States."<sup>46</sup> To give Congress exclusive control over these matters, the states were forbidden by the Constitution to coin money, emit bills of credit, or make anything but gold and silver coin a tender in payment of debts.<sup>47</sup> Until the Civil War the paper money of the country consisted of notes issued by state banks and by the two national banks that were established by Congress in 1791 and 1816. The financial needs of the national government during this conflict forced Congress to authorize the issuance of \$450,000,000 of paper money, known as "greenbacks", and to make them legal tender for the payment of private debts.

<sup>45</sup> R. J. Swenson, *op. cit.*, 125-130.

<sup>46</sup> Art. I, Sec. 8, Cls. 2 and 5.

<sup>47</sup> Art. I, Sec. 10, Cl. 1.



Immediately the constitutionality of its acts was attacked in the courts. In 1870, the Supreme Court by a four-to-three decision,<sup>48</sup> with two vacancies existing, held that Congress had exceeded its authority in authorizing the issue of paper money, but during the next year, after the vacancies had been filled, the Supreme Court by a five-to-four decision in *Knox v. Lee*<sup>49</sup> reversed its former decision, holding that Congress had acted within its rights in issuing legal tender notes. It reaffirmed this decision in 1884.<sup>50</sup> The decisions in these Legal Tender Cases had a far reaching effect, since they gave the national government a "resulting" power, arising from a group of powers, of issuing paper or fiat money and making it legal tender in the payment of private debts. The Court said that all sovereign governments enjoyed this power and that the national government of the United States as the agent of a sovereign nation belonged to this class and, therefore, possessed this power.

The paper currency of the United States (as of June 30, 1927) consists of United States notes, Treasury notes of 1890, which are being gradually retired, Federal reserve notes, Federal reserve bank notes, National bank notes, gold certificates, and silver certificates. The metallic money consists of gold coin, ranging from two and one-half dollars to twenty dollars; silver coin, consisting of dollars, half-dollars, quarters, and dimes; and subsidiary coins, including nickels and cents.<sup>51</sup>

<sup>48</sup> *Hepburn v. Griswold* (1870), 8 Wallace 603.

<sup>49</sup> 12 Wallace 457.

<sup>50</sup> *Julliard v. Greenman*, 110 U. S. 421. There is no more interesting phase of constitutional interpretation to be found than in the history of the Legal Tender Cases. For a short and concise summary of the legal battle waged, see R. E. Cushman, *Leading Constitutional Decisions* (1925), 130-132.

<sup>51</sup> *Annual Report of the Secretary of the Treasury* (1927), 690-691. Paper money is made by the Bureau of Engraving and Printing at Washington. Coinage mints are located in Philadelphia, San Francisco, and Denver. In addition, there are eight assay offices. *Ibid.*, 698.

## CHAPTER XXIV

### NATIONAL CONTROL OF COMMERCE AND INDUSTRY

#### I. IMPORTANCE OF THE RELATION OF GOVERNMENT AND BUSINESS

One of the chief characteristics of our highly industrialized society is the close relationship that has developed between government and business. Public regulation of economic activities has become increasingly essential as giant corporate organizations have come to control the avenues of communication and the sources of supply of many of the necessary commodities of life, not infrequently resulting in a monopoly with its attendant evils. During the past fifty years, the United States has undergone an economic revolution of far-reaching significance, enacting a drama in which corporate wealth and "big business" have played the leading rôle in supplanting agriculture as the chief industry of the nation. Unlike the conditions existing at the time of the adoption of the Constitution, when individualism and *laissez faire* might logically have been demanded, the present economic era, with its many business activities "affected with a public interest," requires governmental control as a means of protecting the major interests of society. In the course of this revolution railroads have spanned the continent; state lines have become mere paper barriers to the operation of business organized on a national and international scale. With the nationalization of business operations, regulation not only became more necessary, but was forced, if it was instituted at all, to assume a national scope. Fortunately, the framers of the Constitution displayed almost prophetic skill in endowing the national government of the United States with such general powers with few limitations as would enable it to meet fairly successfully the exigencies of future developments. These powers, liberally interpreted by the Supreme Court, have proved adequate to the needs of our complicated and technical economic order. Congress, through its constitutional powers over foreign and interstate commerce, taxation, copyrights and patents, bankruptcy, currency, weights and measures, and postal activities has constructed

a system of governmental control that vitally affects almost every economic activity of the nation, from that of the ordinary farmer or cross-roads store to those of a national transportation system or international banking or shipping organization. This system of control has been particularly effective in the regulation of commerce.

## II. THE REGULATION OF COMMERCE

Commerce is the life of business, and freedom of commercial intercourse is the *sine qua non* of a highly organized economic system. In the beginning of our national existence, under the Articles of Confederation, the lack of power in the general government to regulate commerce among the states and with foreign nations was one of its chief defects. The states engaged in a commercial war by means of tariff restrictions, sometimes even in favor of foreign nations, with the result that business was hampered, trade demoralized, and interstate commercial relations impeded. It was this commercial anarchy that furnished one of the major incentives for the reorganization of the Confederacy and the background of the commerce clause placed in the Constitution by the Convention of 1787.

This clause grants Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."<sup>1</sup> In exercising this power, however, Congress was forbidden to deny to any state the right to import slaves before 1808; and in addition, it is denied the power to tax exports, to give preference by any regulation of commerce or revenue to the ports of one state over those of another, or to require vessels bound to, or from, one state to enter, clear, or pay duties in another.<sup>2</sup> With the possible exception of the restriction on the taxing of exports, these limitations are relatively unimportant. Hence, the scope of this grant of power, since it is limited only by the Constitution,<sup>3</sup> must be found in the decisions handed down by the Supreme Court in interpreting the words "to regulate" and "commerce." In the judicial expansion of the commerce clause there may be seen a most significant method of constitutional growth, for, without the changing of a single word in this clause, Congress has been per-

<sup>1</sup> *The Constitution*, Art I, Sec. 8, Cl. 3.

<sup>2</sup> *Ibid.*, Sec. 9, Cls. 1, 5, 9.

<sup>3</sup> "The power to regulate commerce, like all other powers vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution." *Gibbons v. Ogden* (1824), 9 Wheaton 1.

mitted to extend its control to all the objects and means of commercial intercourse in a rapidly developing nation. Although the Constitution was framed at a time when economic life was simple, methods of communication primitive, and trade largely local in character, this clause has been interpreted by congressional action and judicial decisions so as to meet the needs of the railroad, the steamship, the airplane, the telegraph, the telephone, and the radio. Beginning with the famous case of *Gibbons v. Ogden* in 1824,<sup>4</sup> in which Chief Justice Marshall laid down his definition of "commerce" as "intercourse," the development of this clause has continued through a long line of judicial decisions which make the ramifications of its present limits assume extensive proportions exceedingly difficult of definite demarcation.

At the present time, "commerce" includes not only the purchase, sale, and exchange of commodities, but also navigation, the transportation of persons as well as of property by land, water, or air, and the transmission of information by telephone, telegraph, wireless, or radio. In short, it may be said that the commerce power of Congress extends to practically all forms of traffic and intercourse conducted by either individuals or corporations of one state with those of another or of a foreign country. Furthermore, it applies to all the instrumentalities of such commerce and to every device that may be employed to interfere with its freedom; consequently, under certain conditions, persons, railroads and express companies, telegraph and telephone companies, ships and shipping, navigation and navigable waters, canals, bridges, wharves, ferries, animals, and trusts and trade associations become subject to this power.<sup>5</sup> The power of Congress "to regulate" has been construed to mean "to foster, protect, control, and restrain, with appropriate regard for the welfare of those who are immediately concerned and of the public at large."<sup>6</sup> Under this interpretation, Congress has used its power over commerce to establish police regulations, and to grant franchises authorizing corporations to construct national highways, railroads, and bridges from state to state.<sup>7</sup> There are certain transactions, however, even though they are not confined to a single state, that do not fall within the commerce clause. Insurance, whether fire, marine, or life, agriculture, negotiable instruments, manufacture, and mining are not consid-

<sup>4</sup> 9 Wheaton 1.

<sup>5</sup> *The Constitution of the United States* (Annotated, 1924), 110-141; C. K. Burdick, *The Law of the American Constitution* (1922), 206-254.

<sup>6</sup> *Second Employers' Liability Cases* (1912), 223 U. S. 1.

<sup>7</sup> *California v. Central Pac. Ry. Co.* (1888), 127 U. S. 1.



ered instrumentalities of commerce, and are, therefore, not subject to the regulation of the national government under the commerce clause.<sup>8</sup>

While the Constitution grants Congress the power to regulate commerce (1) with foreign nations, (2) among the states, and (3) with the Indians, the third field of regulation since the Indians no longer occupy a status of semi-nationhood has been abolished. It is, therefore, only with the regulation of foreign and interstate commerce that the national government is now concerned.

1. *Foreign Commerce.* The control given to Congress over commerce with foreign nations is more absolute than that respecting interstate transactions. This control, furthermore, is reenforced by the plenary powers of the national government over foreign relations and the jurisdiction of the national judiciary over all admiralty and maritime cases. By virtue of this authority, Congress has passed many laws relating to foreign trade, shipping, and the transportation of persons and property from foreign nations to this country. In many instances the constitutionality of these laws rests upon a dual basis. The power of Congress over importations from foreign countries does not end with their introduction into the United States, but it continues until the products are removed from the original packages and become commingled with the ordinary mass of property in this country. Since the states are generally forbidden to tax imports, state control over goods imported cannot be exercised until the original packages are broken.<sup>9</sup> A brief survey of the principal laws of this nature passed by Congress will give an idea of the scope and character of national control over foreign commerce.

One of the most familiar methods used by Congress in controlling commerce with foreign nations is the tariff, duties levied upon goods introduced into this country for the primary purpose of protecting home industries. The tariff, therefore, is a means

<sup>8</sup> *The Constitution of the United States* (Annotated, 1924), 141-144; J. P. Hall, *Cases on Constitutional Law* (with Supplement, 1926), 1068n, gives a summary of the cases on this point. The decision of the Supreme Court in holding the buying and selling of bills of exchange and the issuing of insurance not to be commerce has been criticized, in some instances as being illogical.

<sup>9</sup> *Brown v. Maryland* (1827), 12 Wheaton 419. It should be noted in this connection that the Constitution gives a state the right to levy such import or export duties as "may be absolutely necessary for executing its inspection laws" subject to revision and control by Congress; otherwise, congressional permission must be obtained (*Constitution*, Art. I, Sec. 10, Cl. 2). In effect it amounts to a prohibition of such duties.

of exercising not only the fiscal powers of the national government, but also its control over commercial activity with foreign countries. Through the operation of tariff laws, the importation of foreign goods may be seriously restricted or virtually prohibited. Furthermore, general requirements as to the character of foreign products may be specified by the tariff the fulfillment of which is a condition precedent to entry.<sup>10</sup>

Closely allied to the method of regulating the importation of foreign goods by means of customs duties is that of levying an embargo, usually during a war or in anticipation of war, which temporarily prevents foreign trade between this country and those countries to which such regulation is applied. Although Congress cannot, as in the case of imports, effect national control over exports by the use of the taxing power, it has on several occasions prevented the shipment of certain goods, especially arms and munitions, from this country to foreign states engaged in war. For instance, during the World War, President Wilson was authorized to lay an embargo upon the shipment of goods to certain neutral countries whose neutrality was suspected; and in addition, the importation of certain articles was prohibited entirely. Such procedure really amounts to an act of retaliation.

Furthermore, Congress has enacted many laws respecting navigation and inspection,<sup>11</sup> to be administered by the Bureau of Navigation through commissioners stationed at the several ports of entry. The purpose of such legislation is to protect not only American shipping interests, but also the rights and wages of seamen and the transportation of persons and goods in merchant vessels. Provisions are made for the registration of vessels; their clearance and entry; the transportation of explosives or dangerous substances on passenger vessels; transportation of passengers and merchandise by steam vessels; inspection of vessels, both foreign and domestic; and detailed regulations relating to the wages, discharge, protection and relief, and punishments for offenses of merchant seamen. In addition, in order to stimulate shipping in American-owned vessels Congress has levied tonnage duties upon ships built or owned in foreign countries. These discriminating duties, however, may be suspended by the President when proof is given to him that a foreign nation is not subjecting vessels belonging to citizens of the United States or goods imported from this country

<sup>10</sup> The tariff laws in force in the United States in 1926 may be found in 19 *U. S. C. A.*, Ch. 3, Secs. 121-199.

<sup>11</sup> 46 *U. S. C. A.*, Ch. 1, Secs. 1-5.

to similar restrictions. Likewise, the President may issue a proclamation putting into effect a retaliatory suspension of commercial privileges granted to the vessels of foreign countries which have denied to the vessels of the United States any of the commercial privileges accorded to those of other countries. Reciprocal commercial privileges may, consequently, be restored in the same manner.<sup>12</sup>

When the World War disrupted the trade of the United States with foreign countries, this country was brought face to face with the fact that most of the goods entering or leaving its ports was transported in vessels owned by other nations. During its early history the United States built a merchant marine that compared favorably with those of foreign nations, but it was not developed from time to time to meet the necessary needs of American shipping. The result was that at the outbreak of the World War in 1914, the United States found itself considerably handicapped in foreign trade by the lack of proper shipping facilities. To remedy this situation by stimulating American shipbuilding, Congress in 1916 passed the Shipping Act which provided for a Shipping Board with power to organize one or more corporations under the laws of the District of Columbia, with a combined capital stock not to exceed \$50,000,000, for the purpose of constructing and operating merchant vessels.<sup>13</sup> This act was further enlarged by the Merchant Marine Act of 1920,<sup>14</sup> which increased the Shipping Board to seven members, and provided for the establishment of steamship lines between the United States and its dependencies and foreign states, and for the creation of a construction loan fund not exceeding \$25,000,000 annually from the revenues derived from sales and operations to be used to aid American citizens in the construction of merchant vessels. The policy underlying this action of the nation is indicated in the first section of this Act which states that "it is necessary for the national defense and for the proper growth of its foreign and domestic commerce that the United States shall have a merchant marine of the best equipped and most suitable types of vessels sufficient to carry the greater portion of its commerce and serve as a naval or military auxiliary in time of war or national emergency, ultimately to be owned and operated privately by citizens of the United States."<sup>15</sup> Under the

<sup>12</sup> 46 U. S. C. A., Ch. 5, Secs. 121-135.

<sup>13</sup> *Ibid.*, Ch. 23, Secs. 801-842.

<sup>14</sup> *Ibid.*, Ch. 24, Secs. 861-889.

<sup>15</sup> *Ibid.*, Ch. 24, Sec. 861.

direction of Congress, a merchant marine has been built which rivals England's for supremacy; trade routes have been established by the Shipping Board which have sent the American flag to certain ports of the world for the first time in seventy-five years; and more than one thousand ships have been sold to American citizens since 1921 in keeping with the declared policy of making the merchant marine privately owned.<sup>16</sup> However, in the event of the complete sale of its ships, the government will undoubtedly continue its policy of aiding shipbuilding. Congress has promoted foreign commerce not only by providing a merchant marine but also by further empowering the War Finance Corporation to make short-time loans to persons or corporations engaged in the export business. This corporation is composed of the Secretary of the Treasury, the Secretary of Agriculture, and four additional persons appointed by the President and Senate for four years.<sup>17</sup> Moreover, in 1919 and in 1922 Congress authorized the incorporation of associations formed for the purpose of engaging in foreign and international banking, and the formation of associations of producers of agricultural products for the purpose of engaging in foreign commerce.<sup>18</sup>

Since commerce includes the transportation of persons as well as property, the national government may regulate immigration by means of its control over foreign commerce. However, as held by the Supreme Court, it would possess this power in any event as an incident to sovereignty.<sup>19</sup> Its control over immigration, therefore, is unlimited. In the first decades of our national existence the flow of immigrants to this country was encouraged as a means of promoting its economic development. The bulk of these immigrants, however, was of Teutonic stock, of the English, German, and Scandinavian races, similar in blood and traditions to the people who founded the nation. They so quickly and easily adapted themselves to their new environment that the social, economic, and political ideals of the country were scarcely affected by their arrival. Hence, no attempt was made to restrict either their character or number. Immediately following the Civil War, new tributaries to the stream of immigration developed. While the immigrants of northern and western Europe still dominated the tide of immigration there was a noticeable increase in the number who

<sup>16</sup> *American Year Book* (1927), 422-424.

<sup>17</sup> 15 U. S. C. A., Ch. 10, Secs. 331-373.

<sup>18</sup> 7 U. S. C. A., Ch. 12, Secs. 291-292; 12 U. S. C. A., Ch. 6, Secs. 611-631.

<sup>19</sup> *Chinese Exclusion Cases* (1889), 130 U. S. 581.



came from southern Europe and the eastern nations.<sup>20</sup> This new type of immigrant, unaccustomed to American traditions and standards of living, presented a new problem of both an international and domestic character which Congress was forced to consider.

The first law of Congress restricting the admission of aliens to this country was adopted in 1882. This law excluded the least desirable immigrants such as escaped convicts, idiots, and persons likely to become public charges.<sup>21</sup> In the following years it was extended to include anarchists, moral bankrupts, paupers and professional beggars, and those affected with contagious or infectious diseases. At the behest of organized labor, Congress, in 1882, passed the Chinese Exclusion Act which denied admission to all Chinese immigrants except students, travelers, diplomats, professional men, or merchants; and in 1885 and 1903 laborers who had expressly or impliedly contracted to work for persons in this country were barred. In 1917, over the veto of President Wilson, Congress provided for a literacy test for aliens over sixteen years of age, requiring of such immigrants the ability to read the English language or some other language or dialect.<sup>22</sup>

These restrictions, relating primarily to the character of the immigrants rather than to their number, proved inadequate to check the stream of immigration which, with the turn of the twentieth century, came to consist of increasing numbers of southern Europeans and Russians, reaching the grand total of 1,285,349 in 1907. While the World War temporarily halted the flow of this stream, immediately following the armistice it was swollen to flood tide by increasing hordes fleeing from poverty. This situation aggravated the labor problem in the United States which had already assumed acute proportions because of the unemployment then existing. The result was the passage of a law by Congress in 1921, restricting immigration to three per cent of the national quotas resident in the United States according to the census of 1910. While this act checked the flow of immigrants, it was neither a logical nor a just solution of the problem. It unduly limited the number of admissible aliens from the northern and western nations of Europe in favor of those from the shores of the Mediterranean, thereby working an injustice upon the majority

<sup>20</sup> A. C. McLaughlin and A. B. Hart, *Cyclopedia of American Government* (1914), II, 143-146.

<sup>21</sup> *Ibid.*, 146.

<sup>22</sup> 8 U. S. C. A., Ch. 6, Sec. 136.

of native-born Americans who were descendants of the Teutonic races of northern Europe. It still remained for Congress to establish an immigration policy which would do justice to the native-born Americans and at the same time accord fair treatment to all nationalities involved.<sup>23</sup>

Accordingly Congress in 1924 laid down what might be termed a national immigration policy.<sup>24</sup> Prior to the beginning of the execution of the permanent policy adopted by Congress, there was to operate a temporary arrangement from 1924 to 1927 during which period immigration was to be restricted to two per cent of the foreign-born persons of each nationality residing in this country according to the census of 1890. The evident purpose of this arrangement was to give special consideration to foreign-born of northern European stocks who formed the majority of our foreign-born population in 1890. The permanent policy which was based on "national origins" was expected to go into effect June 30, 1927. The chief features of this policy are: (1) that the annual total of admissible aliens is fixed at 150,000, with no restriction, except that the general immigration requirements are placed upon immigrants from Canada, Newfoundland, Mexico, Cuba, Haiti, the Dominican Republic, and the independent nations of Central and South America; (2) that the quotas to be assigned to the different nationalities are based proportionately upon the national origins of the white inhabitants of the United States as shown by the census of 1920, except that no quota is allowed to those nationalities ineligible to American citizenship and no national quota may be less than 100; (3) that the Secretaries of State, Commerce, and Labor are charged with the duty of devising the national origins formula. The Secretaries found it exceedingly difficult to get at the national origins of the white inhabitants of the United States, numbering some 95,000,000, and in their first report refused to make any recommendation for the execution of the policy, resulting in the postponement of its operation by Congress for the years 1927 and 1928 and the continuation of the temporary arrangement.<sup>25</sup> However, the Congress, ending March 4, 1929, refused further delay by putting the permanent policy into operation July 1, 1929.

The national origins basis of restrictive immigration is apparently a sound and just policy. It insures that the yearly quotas of

<sup>23</sup> G. W. Hinman, Jr., "National Origins: Our New Immigration Formula," 70 *Am. Rev. of Rev.*, 304-309 (1924).

<sup>24</sup> 8 *U. S. C. A.*, Ch. 6, Secs. 101-299.

<sup>25</sup> *American Year Book* (1927), 490.

immigrants will be miniatures of those nationalities which at present constitute the American nation. These quotas are national rather than racial. Also, due consideration is given to those stocks which form the source of our native-born population since the largest quotas are provided for Great Britain, Ireland, and Germany. Furthermore, to prevent undue hardship aliens having certain relationship with residents of the United States are considered to have "just causes" for admittance and are placed under the "non-quota" group as a means of relieving them of the quota restrictions.<sup>26</sup> Moreover, while the method of determining quotas is permanent, the number of immigrants to be admitted yearly is flexible, and, therefore, may be changed by Congress at will.

For the administration of the immigration laws, Congress established the office of Commissioner General of Immigration in the Department of Labor,<sup>27</sup> who is in charge of the Bureau of Immigration. At the several ports where immigrants are admitted, there are commissioners of immigration, appointed by the President and Senate for four years, and immigration inspectors appointed by the Secretary of Labor. Since 1917 the Commissioner General has been endowed with power to deport undesirable aliens such as anarchists and revolutionists. Under the quota system of restrictions, selection of admissible immigrants at the source is provided in order to prevent hardships arising from the rejection of immigrants after they have reached this country. Under the present system, which was considerably extended in 1927, a prospective immigrant must obtain an immigration visa from an American consul before he embarks for the United States. The results of this system can be appreciated by reference to the fact that only four-tenths per cent of the total number of applicants for admission at the Port of New York in 1927 were debarred.<sup>28</sup>

2. *Interstate Commerce.* The constitutional provision that gives to Congress the power to regulate commerce among the several states has been the means for the development of a system of control by the national government which the framers of the Constitution could hardly have anticipated. While the power of the national government over foreign commerce is plenary, its control over domestic commerce is restricted to the field of interstate commerce, thus leaving the regulation of intrastate commerce to the states. It was impracticable and inexpedient to undertake to mark

<sup>26</sup> *Ibid.*, 495; 8 U. S. C. A., Ch. 6, Sec. 204.

<sup>27</sup> 8 U. S. C. A., Ch. 6, Secs. 101-109.

<sup>28</sup> *American Year Book* (1927), 493-497.

in detail in the Constitution the line of division between federal and state regulation of our domestic commerce. It was not so difficult to draw this line during the first few decades of our history because it was comparatively easy during this period to distinguish between interstate and intrastate commerce. As our society became more complex and interdependent through the industrialization of the nation, these two types of commerce tended to become one. The line separating federal and state regulation became more obscure and difficult to mark. Moreover, it was constantly shifting toward national control. It, therefore, became the business of Congress in the first instance and that of the Supreme Court in final analysis to keep this line readjusted to fit the needs of our constantly changing commercial order. This process of readjustments may be divided into five fairly distinct periods.<sup>29</sup>

The Constructive Period (1789-1829) marks the development of certain fundamental principles. These were (1) that the regulation of interstate commerce by Congress excluded its regulation by the states and (2) that the regulation of purely intrastate commerce belonged to the states whether or not they exercised it. Commerce was defined as "intercourse," thereby including navigation,<sup>30</sup> and commerce among the states or interstate commerce was held to apply to more than one state, to extend beyond state lines, and to remain so in character until it was removed from the "original package."<sup>31</sup> It, therefore, did not become intrastate commerce and subject to state regulation until it was commingled with the mass of state property. Whether the states could participate in the regulation of interstate commerce in the absence of congressional regulation remained an open question. The results of this period amount to an extension of federal regulation by giving a broad meaning to commerce and by allowing the interstate character of commerce to attach as long as the article was in the "original package."

The States Rights Period (1829-1876) was characterized by a

<sup>29</sup> No contention is made that these periods are definitive, since there is some overlapping from one period to another. However, the broad general rules laid down by the Court in each period will show the significance of these divisions.

<sup>30</sup> *Gibbons v. Ogden* (1824), 9 Wheaton 1.

<sup>31</sup> *Brown v. Maryland* (1827), 12 Wheaton 419. This case concerned the right of a state to tax persons selling foreign articles by wholesale. The decision intimated that the principle enunciated would apply equally "to importations from a sister state." Later the rule was extended specifically to such importations. See *Leisy v. Hardin* (1890), 135 U. S. 100; *Austin v. Tennessee* (1900), 179 U. S. 343.



rather liberal interpretation of state regulation. While the principles of the first period were maintained, it was announced that the states could regulate local matters affecting interstate commerce in the absence of congressional regulation. The states were thus given concurrent jurisdiction with Congress in the regulation of interstate commerce; however, control over matters essentially national in character affecting interstate commerce was declared to be exclusive in Congress.<sup>32</sup> What matters were essentially national in character and what were local in character became the basis for separating federal and state regulation in the field of interstate commerce. This, of course, became a matter of definition for the Supreme Court in final analysis to settle. However, during this period the construction of a dam across a navigable stream and the control of pilotage were construed as local matters and, therefore, could be regulated by the states until Congress intervened.<sup>33</sup> The substance of this period was the extension of state regulation to some phases of interstate commerce and the beginning of the distinction between local and national matters in this field.

The Extreme States Rights Period (1876-1886) continued the principles previously announced, but broadened the concurrent power of the states over interstate commerce. The Supreme Court during this period held that a state could, under its police power, fix the maximum rates for grain elevator charges,<sup>34</sup> and in the absence of congressional legislation could regulate the rates for interstate as well as for intrastate shipments.<sup>35</sup> This period resulted in granting to the states power over certain matters that appeared to be of national importance.

The Extreme State Rights Period, however, gave way to the Federalistic Period (1886-1913), which was noted for its centralizing tendencies in the control of interstate commerce. In 1886 the Supreme Court repudiated its former view and held that a state could not regulate interstate rates, regardless of the inaction of Congress.<sup>36</sup> This decision led to the passage of the Interstate Commerce Act of 1887. Furthermore, it was held that a state could not prevent a carrier from charging more for internal transportation than for similar interstate transportation for a greater distance over

<sup>32</sup> *Cooley v. Board of Wardens of Philadelphia* (1851), 12 Howard 299.

<sup>33</sup> *Willson v. Blackbird Creek Marsh Co.* (1829), 2 Peters 245; *Cooley v. Board of Wardens of Philadelphia* (1851), 12 Howard 299.

<sup>34</sup> *Munn v. Illinois* (1876), 94 U. S. 113.

<sup>35</sup> *Peik v. Chicago Ry. Co.* (1876), 94 U. S. 164.

<sup>36</sup> *Wabash, St. L. & P. Ry. Co. v. Illinois* (1886), 118 U. S. 557.

the same route.<sup>37</sup> This period witnessed the establishment of exclusive national control over interstate rates.

The last period in the evolution of federal control over domestic commerce may be termed the Period of Judicial Amendment, extending from 1913 to the present, during which the distinction between interstate and intrastate commerce is becoming increasingly difficult to make. The tendency is for the former to absorb the latter and for federal control to apply to both. During this period the Supreme Court held that Congress, acting through the Interstate Commerce Commission, could actually fix intrastate rates when it is necessary to make its control over interstate commerce effective.<sup>38</sup> It also established the principle of "direct and indirect" interference, invalidating all state laws which directly interfere with national control of interstate commerce and its agencies.<sup>39</sup> The paramount importance of national interests is firmly recognized, and the purely intrastate field of commercial regulation under state control has become, almost in fact, a mere theory.

However, state laws which only indirectly affected interstate commerce have generally been upheld by the Supreme Court. In the first place, it has been shown that the states may regulate matters of local concern in the absence of controlling legislation by Congress. For example, a state has authority to construct and regulate wharves, piers, docks, roads, bridges, and dams across navigable waters; to regulate pilots and pilotage; and to control the business and charges of public warehousemen engaged in elevating and storing grain for profit.<sup>40</sup> In the second place, under the police power of the states, many laws have been enacted for the purpose of protecting the lives, health, and comfort of persons within their borders; and such laws, although affecting interstate commerce indirectly, have been uniformly upheld by the courts as reasonable police regulations. By means of the police power, the states may require the licensing and examining of locomotive engineers, forbid the running of freight trains on Sunday, regulate the heating of passenger cars, request the placing of guards and guard posts on railroad bridges and trestles, establish quarantine and health regulations, provide for the inspection of articles

<sup>37</sup> *Louisville & Nashville Ry. Co. v. Eubank* (1902), 184 U. S. 27.

<sup>38</sup> *Railroad Commission of Wisconsin v. Chicago, B. & Q. Ry. Co.* (1922), 257 U. S. 563; *Houston, E. & W. T. Ry. Co. v. United States* (1914), 234 U. S. 342.

<sup>39</sup> *Giovanni di Santo v. Pennsylvania* (1927), U. S. Supreme Court Advance Opinions, Jan. 15, 1927, 314 ff.

<sup>40</sup> *Constitution of the United States* (Annotated, 1924), 170-176.

brought within their boundaries as a means of protecting health and preventing fraud, and regulate the speed and stoppage of trains, and other minor matters in regard to railroads.<sup>41</sup> The police power of the states, however, can not be used to interfere directly with interstate commerce. It may be used to interfere indirectly in such instances as given above only in the absence of congressional regulations. With this exception, it may be concluded that state regulation of interstate commerce by the police power, directly or indirectly, is invalid.

In exercising the commerce power which includes control over all the instrumentalities of commerce, Congress has from time to time enacted considerable legislation which had the character of police regulations and in effect amounted to the establishment of a national police power.<sup>42</sup> The main purpose of such legislation was to prohibit and suppress traffic in objectionable forms of interstate commerce. By this means, Congress has prohibited the transportation of lottery tickets, and impure foods and drugs, in interstate commerce, placed heavy penalties upon interstate traffic in women for immoral purposes, and required the inspection of articles transported from state to state. Furthermore, railroads engaged in interstate commerce have been regulated through the Federal Safety Appliance Act, the Federal Employers' Liability Act, and the Adamson Law providing for an eight-hour day.<sup>43</sup> However, when Congress by the Keating-Owen Act in 1916 attempted to regulate child labor by closing the channels of interstate commerce to the products of those manufacturers who employed children under certain conditions, the Supreme Court by a five-to-four decision held that this act provided for an unwarranted expansion of the police regulations of the national government, and was, therefore, unconstitutional, saying that "over interstate transportation, or its incidents, the regulatory power of Congress is ample, but the production of articles, intended for interstate commerce, is a matter of local regulation."<sup>44</sup> Although the logic of this decision may be questioned, the fact remains that if this act of Congress had been sustained, the effect would have been the expansion of commerce to include manufacturing and as a result a considerable contraction of the police power of the states.

<sup>41</sup> R. J. Swenson, *The National Government and Business* (1924), 199-201. See summary of cases given here.

<sup>42</sup> Other regulatory laws have been passed under the taxing power and under the postal power.

<sup>43</sup> Swenson, *op. cit.*, Ch. XVII.

<sup>44</sup> *Hammer v. Dagenhart* (1918), 247 U. S. 251.

## III. ADMINISTRATIVE CONTROL OF TRANSPORTATION

It is obvious from the above discussion that such extensive control as the national government exercises over interstate commerce could not be effected by mere legislation and judicial decisions. Effective regulation must be continuous and flexible instead of spasmodic and rigid. Congress was finally forced in order to make its control over interstate commerce effective to establish in 1887 the Interstate Commerce Commission, which in the course of time has come to be "the economic supreme court of the American transportation world."

The Act of 1887, with the amendatory acts of 1889, 1893, 1903, 1906, 1908, 1910, 1913, and the Transportation Act of 1920, provides in detail for the regulation of transportation.<sup>45</sup> This regulation applies to all common carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water, the transportation of oil by pipe line, and the transmission of intelligence by wire or wireless. The term "common carrier" includes all pipe-line, telegraph, telephone, cable, express, and sleeping-car companies; and all persons, natural or artificial, engaged in such transportation or transmission. It also makes it the duty of these carriers to furnish transportation by means of through routes and at just and reasonable charges for the services rendered, limits the free ticket or free pass system, prohibits the railroads from transporting articles manufactured or produced by themselves except timber, forbids rebates and special rates or undue preferences, requires a special order of the commission for combinations and consolidations of carriers, and compels common carriers to publish their schedules and statements of rates.

The responsibility for the enforcement of the acts relating to transportation rests upon the Interstate Commerce Commission. It has the power to prescribe interstate rates, and, may determine intrastate rates when these affect interstate commerce. In 1913, it was directed to make a "physical valuation" of the entire property owned by the railroads and in 1920 it was empowered to prescribe a fair return for the railroads upon this valuation,<sup>46</sup> and to prepare a plan for their consolidation into a limited number of systems.<sup>47</sup> Appeals from the findings of the commission may under

<sup>45</sup> 49 U. S. C. A., Ch. 1, Secs. 1-26.

<sup>46</sup> *Ibid.*, Ch. 1, Secs. 15a and 19a.

<sup>47</sup> *Ibid.*, Ch. 1, Sec. 5.



certain conditions be taken to the Federal District Court and finally to the Supreme Court of the United States. The enforcement of the orders of the Commission rests with the Department of Justice upon the complaint of the Commission.<sup>48</sup>

In addition to the functions of the Interstate Commerce Commission relating to transportation, Congress, by the Railway Labor Act of 1926, established the United States Board of Mediation for the arbitral settlement of disputes between employees and common carriers. In the same year provision was also made for the promotion of air commerce, and in 1927 the Federal Radio Commission was created to regulate the broadcasting of radio stations.<sup>49</sup>

#### IV. CONTROL OF INDUSTRIAL CORPORATIONS

In the last quarter of the nineteenth century, huge industrial corporations, trusts, and holding companies supplanted individual enterprise in the American business world; and as a result, many trades were monopolized, prices being controlled by the boards of directors of these organizations. Since these organizations were interstate in their operation, they could not be successfully prosecuted in the state courts under the common law principle of unreasonable restraint of trade; hence a demand was made for their regulation by Congress. While it was understood that Congress could not directly control manufacturing or manufacturing companies, it was thought that the interstate activities of these organizations were such as to enable it through its control over commerce to prevent them from restricting the freedom of interstate traffic. Accordingly in 1890 Congress passed the Sherman Anti-Trust Act, which declared "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations", to be illegal, and forbade with penalty any attempts at monopoly.<sup>50</sup> Enforcement of this act was left to the Department of Justice as no special administrative machinery was established for this purpose. Later, however, there was created in the Department of Commerce and Labor the Bureau of Corporations which served

<sup>48</sup> For more detailed discussion of composition, procedure, and powers of the commission, see *supra*, Ch. XVII.

<sup>49</sup> This commission was to operate with full powers for a period of only two years, but its life has been extended to Dec. 31, 1929, at which time radio control is expected to revert to the Secretary of the Treasury with the commission retained in an advisory capacity.

<sup>50</sup> 15 U. S. C. A., Ch. 1, Sec. 1.

as an aid to enforcement until the establishment of the Federal Trade Commission in 1914.

The Sherman Act was too inclusive and indefinite. It failed to distinguish between reasonable and unreasonable restraint of trade, and, therefore, was attacked in the courts. The interpretation of the act by the Supreme Court, after a sort of wavering hesitation, was at first rather rigid, holding that every combination that restricted trade or was capable of doing so was illegal.<sup>51</sup> Later, however, the Court modified this view by reading into the Sherman Act the common law "rule of reason," holding that only those combinations which "unduly" or "unreasonably" restrain trade are subject to the penalties of the act.<sup>52</sup>

The results of these decisions were, in the first place, to make the enforcement of the Sherman Act extremely difficult; in the second place, to create a demand on the part of corporate business for a restatement of the law in such form as to make clear just what practices were considered unreasonable; and in the third place, to prove the inadequacy of the Sherman Act and the need for a systematic method of continuous control of corporations modeled after the system of railroad regulation. Accordingly, in 1914, Congress passed the Clayton Anti-Trust Act which largely eliminated the indefiniteness of the Sherman Act by specifically forbidding price discriminations which lessen competition, price-fixing in patented or unpatented articles, acquisition under certain conditions by one corporation of the stock of another, and interlocking directorates.<sup>53</sup> Moreover, one section of this act partially overruled the decision of the Supreme Court under the Sherman Act with respect to labor unions by declaring that labor, agricultural, or horticultural organizations, not conducted for profit, should not be considered as illegal combinations in restraint of trade under the anti-trust laws, nor should they be forbidden to accomplish their *legitimate* objects. By this act, a boycott could be either legal or illegal depending upon its effect. Each case would be judged on the basis of the facts.

For the more effective administration of the anti-trust laws, Congress in 1914 created the Federal Trade Commission with the primary duty of preventing persons, partnerships, or corporations, except banks and common carriers, from using unfair

<sup>51</sup> *Northern Securities Co. v. United States* (1904), 193 U. S. 197, and *Loewe v. Lawlor* (1903), 208 U. S. 274. This latter case is commonly called the "Danbury Hatters Case."

<sup>52</sup> *United States v. American Tobacco Co.* (1911), 221 U. S. 106.

<sup>53</sup> 15 U. S. C. A., Ch. 1, Secs. 13-32.

methods of competition in commerce.<sup>54</sup> Through its powers of investigation it is in position to secure accurate information on which to base its rulings from which appeals lie to the courts. It is related to business in about the same way as the Interstate Commerce Commission is to transportation.<sup>55</sup> In 1918 Congress enacted the Webb-Pomerene Act,<sup>56</sup> which exempts from the operation of the anti-trust laws those associations engaged solely in the export trade, provided they do not restrain trade in the United States or the export trade of an American competitor. Furthermore, in 1921 packers and stockyards,<sup>57</sup> and in 1922 agricultural associations, fulfilling certain requirements, were exempted from the operation of the anti-trust laws and placed under the control of the Secretary of Agriculture.<sup>58</sup>

## V. PATENTS AND COPYRIGHTS

The Constitution gives Congress the power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."<sup>59</sup> Under this clause Congress has provided that books, lectures, musical compositions, maps, motion pictures, and works of art may be copyrighted. A copyright extends for a term of twenty-eight years, subject to renewal for a similar period, and gives to the grantee exclusive rights of a very important nature. A register of copyrights is in charge of the copyright office of the Library of Congress, and performs all the duties relating to the registration of copyrights. If conflicts arise between grantees of copyrights, resort may be had to the courts. Patents are granted under certain conditions to persons inventing or discovering any useful art, machine, manufacture, or composition of matter.<sup>60</sup> They are issued by the Patent Office of the Department of Commerce, after full investigation, and give to the patentee the exclusive right "to make, use, and vend the invention or discovery throughout the United States, and the Territories

<sup>54</sup> 15 U. S. C. A., Ch. 2, Secs. 41-51. Those practices which are considered forms of "unfair competition" are enumerated in Swenson, *op. cit.*, 414-415.

<sup>55</sup> For a more extended discussion of the composition, powers, and procedure of this Commission, see *supra*, Ch. XVII.

<sup>56</sup> 15 U. S. C. A., Ch. 2, Secs. 61-65.

<sup>57</sup> 7 U. S. C. A., Ch. 9, Secs. 191-229.

<sup>58</sup> *Ibid.*, Ch. 12, Secs. 291-292.

<sup>59</sup> Art. I, Sec. 8, Cl. 8.

<sup>60</sup> 35 U. S. C. A., Ch. 2, Sec. 31.

thereof," for the term of seventeen years.<sup>61</sup> Under the Clayton Act, a patentee is forbidden to fix the price of his patent;<sup>62</sup> after sale, he cannot dictate the price of resale, nor can he sell on condition that the purchaser will not buy from his competitors, if the effect of such action is to lessen competition or create a monopoly in any line of commerce. Congress regulates trade-marks by means of its power over interstate commerce.<sup>63</sup>

## VI. OTHER POWERS OF CONGRESS AFFECTING BUSINESS

The Constitution grants Congress the power to establish "uniform laws on the subject of bankruptcies throughout the United States."<sup>64</sup> It was not until 1898 that Congress definitely committed itself to the exercise of this power by passing a general bankruptcy law which is now in force throughout the United States and territories.<sup>65</sup> This law provides for both voluntary and involuntary bankruptcy. Any person, except a municipal, railroad, insurance, or banking corporation, is entitled to be adjudged a voluntary bankrupt. Any natural person, except a wage earner or a farmer, or any unincorporated company, or a moneyed business, or commercial corporation, except those corporations excluded from voluntary bankruptcy, owing debts to the amount of \$1,000 or more, may be adjudged an involuntary bankruptcy through default or after an impartial trial.<sup>66</sup> Certain positive duties, however, are required of the bankrupt; court procedure is outlined; and specific regulations are laid down as to the claims of creditors. The district courts of the United States have jurisdiction of proceedings in bankruptcy.

Congress is also vested by the Constitution with the power to "fix the standard of weights and measures" throughout the United States.<sup>67</sup> Under this clause it has authorized the use of the metric system, and has directed the Secretary of the Treasury to prepare suitable standards in accordance with the law and to deliver a complete set to the governor of each state in the Union for the

<sup>61</sup> *Ibid.*, Ch. 2, Secs. 39, 40.

<sup>62</sup> 15 U. S. C. A., Ch. 1, Sec. 14.

<sup>63</sup> *Trade-Mark Cases* (1879), 100 U. S. 82. For congressional legislation in regard to trade-marks, see 15 U. S. C. A., Ch. 3, Secs. 81-128.

<sup>64</sup> Art. I, Sec. 8, Cl. 4.

<sup>65</sup> Congress had passed three laws on the subject of bankruptcy prior to 1898, but in each instance the law was repealed a few years after its passage. See Burdick, *op. cit.*, 337.

<sup>66</sup> 11 U. S. C. A., Ch. 3, Sec. 22.

<sup>67</sup> Art. I, Sec. 8, Cl. 5.



use of agricultural colleges receiving federal aid.<sup>68</sup> Also standards of electricity and standard barrels, baskets, and containers have been provided for certain commodities.<sup>69</sup>

Congress is also granted by the Constitution the power "to establish post offices and post roads,"<sup>70</sup> a power closely related to that of the commerce clause. By means of the postal power Congress not only has designated the route over which mail shall be carried and the offices where letters and mailable documents shall be received for distribution, but also has provided regulations for the safe and speedy transit of such documents. It has also used the same authority to institute condemnation proceedings for the establishment of post offices,<sup>71</sup> and to grant franchises authorizing corporations to construct national highways and bridges from state to state.<sup>72</sup>

Congress has used its postal powers to make certain important police regulations which, in effect, have contributed to the establishment of a national criminal code. Lottery, or gift-enterprise circulars, obscene matter, and schemes to defraud are among the most common things which are forbidden to be transported through the mails.<sup>73</sup> The determination of such matters rests largely within the discretion of Congress. Furthermore, in expanding postal facilities, Congress has created a city delivery system, a rural delivery system, and an air mail service, and has made provision for the registration of mail, the issuance of money orders for the transmittal of money, and the receiving of deposits of money in a postal savings account.<sup>74</sup>

The foregoing discussion reveals in a significant way the extent to which the national government has used certain constitutional powers in regulating many of the most important economic interests of this country. If recent developments may be taken as a criterion, there is every reason to believe that these powers will be expanded in accordance with future demands. The economic activities of the United States are so varied, so complex in character, and so distinctly national in scope that only national control can meet the requirements of our society. Since government is pri-

<sup>68</sup> 15 U. S. C. A., Ch. 6, Secs. 201-265.

<sup>69</sup> *Ibid.*, Ch. 6, Secs. 221-256.

<sup>70</sup> Art. I, Sec. 8, Cl. 7.

<sup>71</sup> *Kohl v. United States* (1875), 91 U. S. 367.

<sup>72</sup> *California v. Central Pac. Ry. Co.* (1888), 127 U. S. 1.

<sup>73</sup> 18 U. S. C. A., Ch. 8, Secs. 301-360.

<sup>74</sup> 39 U. S. C. A., Ch. 4, Sec. 151; Ch. 5, Sec. 191; Ch. 10, Sec. 381; Ch. 13, Sec. 461; Ch. 19, Sec. 711; Ch. 20, Sec. 751.

marily applied economics, there should be the closest coöperation between government and business. The future of private initiative in business is conditional upon the success of this program. According to all the signs of the present it is this solution or state socialism.

## CHAPTER XXV

### MILITARY AFFAIRS AND LIMITATIONS UPON THE POWERS OF CONGRESS

#### I. MILITARY AFFAIRS

1. *War and Peace in the Convention.* The records of the Convention of 1787 reveal the fact that the matters of war and peace were among the more controversial matters considered by it in drafting the Constitution. Who was to declare war? The Senate, the President, or Congress? Or was the right of war to be considered as inherent in national existence and, therefore, not regarded as an express power whose exercise should be left to the discretion of any one department of the government? Was this power to be designated as that of making war or declaring war? Might it be necessary in an emergency for the President to make war before a formal declaration could be made if the power to declare was given to Congress? Moreover, should the same authority have control of both war and peace? Would the war-making agency, if it also had control of peace, be inclined to continue war after peace conditions had arrived? Furthermore, was not peace of such a nature as to involve the action of other powers, and, therefore, could not be made or declared by any single government?

The Articles of Confederation gave Congress the "sole and exclusive right and power of determining on war," but the assent of nine states was necessary to a declaration.<sup>1</sup> Randolph, in discussing the weaknesses of the Confederation in the Convention, stated that one of these was that Congress could neither prevent nor support a war by its own authority,<sup>2</sup> yet in his resolutions he made no suggestion to remedy this defect. Nor did the New Jersey Proposal consider this matter, but both Pinckney and Hamilton in their plans provided that "the Senate shall have the exclusive power to declare war."<sup>3</sup> There seems to have been little attention

<sup>1</sup> Art. IX.

<sup>2</sup> Hunt and Scott, *Debates in the Federal Convention of 1787*, 23.

<sup>3</sup> *Ibid.*, 102, 119, 604.

given this matter until the "Committee of Detail" reported on August 6, giving Congress the power "to make war."<sup>4</sup>

By the 17th of August, the Convention in discussing the Committee's report had reached the matter of the war power. Pinckney opposed vesting it in Congress for the following reasons: (1) its proceedings too slow and (2) the House of Representatives too numerous for such deliberations. He favored giving the war power to the Senate alone because of (1) its acquaintance with foreign affairs, (2) its treaty-making power, and (3) its provision for the equal representation of the states.<sup>5</sup> It was also proposed that the President was the safest depository for this power. Some felt that Congress should have the control of peace if it had the war power; others thought that these powers should not be in the same hands, feeling that it should be more difficult to make war than peace. Again, it was proposed to substitute "to declare war" for "to make war," for the reason that it might be necessary to make war in an emergency before Congress, not being in session, would be able to provide for the situation. After this substitution was made by a vote of 8 to 1, it was decided to give Congress the power to declare war without having control of peace. Peace was left to the treaty-making power which was finally given to the President and the Senate. The Supreme Court recognized the right of the President to declare the existence of a state of peace in 1865, but this would doubtless not hold for a foreign war declared by Congress.<sup>6</sup>

2. *Declaration of War.* The Constitution gives to Congress the power "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water."<sup>7</sup> It also expressly forbids the states "to engage in war unless actually invaded, or in such imminent danger as will not admit of delay," without the consent of Congress.<sup>8</sup> It is thus seen that both the nation and the states may engage in war under certain conditions without the consent of Congress, but that only Congress can declare war.

Any nation entering into war is under international obligations to make it known to the world by an act equivalent to a public declaration such as recalling its foreign minister or refusing to have intercourse with the opposing nation. The declaration of war by Congress is limited to foreign wars; it cannot declare war

<sup>4</sup> *Ibid.*, 341.

<sup>5</sup> *Ibid.*, 418.

<sup>6</sup> *The Protector* (1871), 12 Wallace 700.

<sup>7</sup> Art. I, Sec. 8.

<sup>8</sup> *Ibid.*, Sec. 10.



against a state of the Union. The declaration may recognize that a state of war exists or shall exist and take the form of a legislative act or a joint resolution, either of which requires the approval of the President. While Congress has never declared war except on the recommendation of the President, it undoubtedly has the power to do so on its own initiative.

3. *Letters of Marque and Reprisal*. The power to grant letters of marque and reprisal are recognized by international law as belonging to the war powers, though the declaration of Paris of 1856, to which the United States has not adhered, abolished privateering among the powers concerned. While the United States has not formally accepted the doctrine of the declaration, it has in practice. The granting of letters of marque and reprisal amounts to commissioning private individuals by the government to take the property of a foreign state, or of its citizens or subjects, as a reparation for an injury committed by it, or its citizens or subjects. Reprisal means taking back or repossessing one's self of something unjustly taken by another. Congress may also make rules concerning property seized in times of war, whether within the United States or upon foreign soil or the high seas.

4. *Raising Military Forces*. Congress under the Constitution has power (1) to raise money for the common defense, (2) to raise and support armies, (3) to provide and maintain a navy, (4) to make rules and regulations for the government of the land and naval forces, (5) to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions, (6) to provide for the organizing, arming, and disciplining of the militia, and for governing such part of them as are employed in the service of the United States, and (7) to pass all laws necessary for the enforcement of these powers.<sup>9</sup> Of course, the powers to levy taxes, borrow, and coin money are adjuncts to the above powers in times of war.

For the support and maintenance of the army and navy, Congress is limited to an appropriation for only two years, but the means of accomplishing these objects are practically unlimited. They include not only provision for food, clothing, transportation, equipment, and medical care, but also construction of ports, coast defenses, barracks, arsenals, depots, coaling, and naval stations and yards. They also include the manufacturing of arms and ammunition, the building of ships, the training of officers, troops, and sailors in war and navy colleges and military camps, the con-

<sup>9</sup> *Ibid.*, Art. I, Sec. 8.

struction of aircraft, the organization and maintenance of war and navy departments, the payment of bounties and pensions, and the construction of railways for the transportation of troops.

Military forces may be raised (1) by volunteer enlistment as in times of peace, (2) by calling on the states to furnish troops, and (3) by conscription or draft. The army has always been small, numbering less than 27,000 men until 1898, but in 1901 shortly after the war with Spain Congress authorized the President to increase it to 100,000 men. This is about its peace strength at the present time. In times of peace the army is recruited from volunteers between the ages of eighteen and thirty-five who are able to pass a rigid physical examination. The purposes of the peace army are to garrison military posts and stations, to protect government property, and to serve as a reserve force to control disturbances within the states with which they are unable to cope. Troops were raised by conscription during the Civil War and the Great War. The Supreme Court has sustained the power of Congress to establish compulsory military service.<sup>10</sup>

The militia of the several states may, according to the Constitution, be used for three purposes: (1) to execute the laws of the United States, (2) to suppress insurrections, and (3) to repel invasions. It has been contended that these specific provisions for the use of the militia by the government of the United States prevent their employment in a foreign war or their conscription into the military service of the nation. If this contention were constitutionally valid, it would amount to a serious limitation upon Congress in raising military forces for foreign wars. This view, however, has been overruled as being inconsistent with the war powers of Congress.<sup>11</sup> The National Defense Act of 1916 provided for the taking of an oath by the militia to the United States and for their use in its service as individuals, not as organizations, at the call of the President.<sup>12</sup> The militia includes all able-bodied men between the ages of eighteen and forty-five, but only a small portion of these are organized into the regular militia, or National Guard.

The navy, although an effective arm of the government in the struggle with the Barbary pirates (1801-5) and in the War of 1812, remained distinctly inferior to the other navies of the world until the latter part of the nineteenth century. In the Spanish-

<sup>10</sup> *Selective Draft Law Cases* (1918), 245 U. S. 366, 378.

<sup>11</sup> *Cox v. Wood* (1918), 247 U. S. 3.

<sup>12</sup> Act of June 3, 1916, Secs. 70, 73, 111, 39 Stat. 166.

American War and the Great War, it was the chief military weapon of the government. Congress maintains a Naval Academy at Annapolis where a six-year course is given to midshipmen in naval science, the last two years being spent at sea, and a Naval War College at Newport, R. I., where naval officers are given instruction in special branches. At present two midshipmen for each Senator, Representative, and delegate in Congress, two for the District of Columbia, and fifteen each year from the enlisted personnel of the navy, are, upon the nomination of their individual Senator, Representative, or delegate, appointed by the Secretary of the Navy. The candidates must be between sixteen and twenty years of age and pass an entrance examination. They receive \$600 a year from the date of admission and upon graduation receive commissions as lieutenants of the junior grade. The ranks in the navy are admiral, vice-admiral, rear admiral, captain, commander, lieutenant commander, lieutenant, junior lieutenant, and ensign.

Under the power "to make rules for the government and regulation of the land and naval forces," Congress has established a code of military law. Petty offenses in both the army and navy may be punished by the commanding officer, but more serious offenses are tried by courts-martial, which are courts of special and limited jurisdiction established by Congress to administer military law. No use of trial by jury is made by these courts and their decisions, if they have jurisdiction, are not subject to review by civil courts.<sup>13</sup>

5. *Increase in Powers of Congress in Time of War.* The effective exercise of the so-called war powers generally forces an extension of the control by Congress of many related subjects which in time of peace the Constitution excepts from its authority. This is not because the Constitution is suspended during war but because the nature of war is such as to call for the entire strength of the nation. In fact, during war practically all other powers of the government become adjuncts to the war powers and the nation acquiesces in their almost absolute exercise.<sup>14</sup> While there are applicable constitutional limitations, they will be liberally construed by the courts.<sup>15</sup>

For instance, due process as to property rights is a different

<sup>13</sup> *United States v. Pridgeon* (1894), 153 U. S. 48; *Johnson v. Sayre* (1895), 158 U. S. 109; *Reaves v. Ainsworth* (1911), 219 U. S. 296.

<sup>14</sup> C. R. Hough, "Law in War Time—1917," 31 *Harv. L. Rev.*, 692; E. Wambaugh, "War Emergency Legislation," 30 *Harv. L. Rev.*, 663.

<sup>15</sup> *Hamilton v. Kentucky Distilleries Co.* (1919), 251 U. S. 146, 156; *United States v. Cohen Grocery Co.* (1921), 255 U. S. 81, 88.

thing in time of war from what it is in time of peace. The legislation giving the national government complete control of the railroads and telegraph lines, regulating the price of fuel, enforcing nation-wide prohibition without an amendment to the Constitution, and providing for the commandeering of ships and the output of manufactures is an illustration of how property rights may be subjected to the "necessary and proper clause." The assumption of the control of the property of aliens was regarded by the Supreme Court as so clearly within the jurisdiction of Congress as to require no discussion.<sup>16</sup> The destruction of property by military operations does not legally bind the government to make compensation. If compensation is made, it is in the nature of a bounty and not a payment of an obligation. The power of the government to fix the rates for both interstate and intrastate commerce during the World War was sustained by the Supreme Court.<sup>17</sup>

In the field of morals the power of Congress is likewise sweeping in time of war. The prohibition act and the power given the Secretary of War to regulate the moral conditions surrounding military camps are examples of an invasion of the police powers of the states on the grounds of military necessity. It may be concluded that legislation by Congress reasonably necessary to the successful prosecution of a war then in progress will meet with judicial approbation even though it invades the police power of the states.<sup>18</sup>

## II. LIMITATIONS UPON THE POWERS OF CONGRESS

The general limitations upon Congress have been partially considered in connection with guarantees of private rights as one of the principles of the Constitution. It remains to notice only the nature of these limitations. They are of two kinds: express and implied. The express limitations relate (1) to the method of the exercise of certain express powers, as, for example, that direct taxes shall be apportioned among the several states according to their respective population and that indirect taxes shall be uniform throughout the nation, and (2) to absolute prohibitions on the exercise of certain powers in any manner. These prohibitions are

<sup>16</sup> *Central Trust Co. v. Garven* (1921), 254 U. S. 554.

<sup>17</sup> *Northern Pacific Ry Co. v. North Dakota* (1919), 250 U. S. 135.

<sup>18</sup> *United States v. Carey* (1918), 247 Fed. 362; *Pappens v. United States* (1918), 252 Fed. 55; *McKinley v. United States* (1919), 249 U. S. 397.



found in Section 9 of Article I and in the first eight Amendments. The first group of limitations forbid Congress to suspend the writ of habeas corpus except in cases of rebellion or invasion, to pass a bill of attainder or ex post facto law, to levy a direct tax except in proportion to population or an export duty, and to confer a title of nobility. The first eight amendments which were early construed as limitations exclusively on the government of the United States<sup>19</sup> guarantee freedom of speech, religion, and the press; the right to keep and bear arms; security of person and effects against unreasonable searches and seizures; and due process of law in both civil and criminal matters.

The implied limitations are those derived from the express limitations and from the general nature of the federal system. The principles which govern the distinction of implied powers from express powers equally apply to the interpretation of express limitations. "If powers granted," said Justice Brewer, speaking for the Supreme Court, "are to be taken as broadly granted and as carrying with them authority to pass those acts which may be reasonably necessary to carry them into full execution; in other words, if the Constitution in its grant of powers is to be so construed that Congress shall be able to carry into full effect the powers granted, it is equally imperative that where prohibition or limitation is placed upon the power of Congress, that prohibition or limitation should be enforced in its spirit and to its entirety. It would be a strange rule of construction that language granting powers is to be liberally construed, and that language of restriction is to be narrowly and technically construed. . . . The true spirit of constitutional interpretation in both directions is to give full, liberal construction to the language, aiming ever to show fidelity to the spirit and purpose."<sup>20</sup> In other words, if the liberal construction of a power tends to increase its strength, then a similar interpretation of a limitation would make it still more restrictive or add an implied restriction.

"The Constitution, in all its provisions," said Chief Justice Chase, "looks to an indestructible Union, composed of indestructible States."<sup>21</sup> It is, therefore, necessary to preserve the administrative autonomy of the states if a properly balanced federal system is to be maintained. The principle of indestructible states is then a general limitation on the powers of the Union. In the inter-

<sup>19</sup> *Barron v. Baltimore* (1833), 7 Peters 243.

<sup>20</sup> *Fairbank v. United States* (1901), 181 U. S. 283.

<sup>21</sup> *Texas v. White* (1869), 7 Wallace 700.

est of this principle it is a general rule of construction that the government of the United States in the exercise of its powers should not, except in cases of absolute necessity, impose the performance of unnecessary duties upon the states or by taxation or otherwise interfere with their free and independent operation.

## CHAPTER XXVI

### TERRITORIES AND PROTECTORATES<sup>1</sup>

#### I. THE UNITED STATES A COLONIZING POWER

It was inevitable that the birth of the United States would mark the entrance of another nation into the colonizing game. In the first place, colonies at this time were regarded as a necessary part of the baggage of a first-class power, a feeling that is not entirely eliminated at the present time. In the second place, the Americans had been the colonizing agents of Great Britain, had learned the game by experience, and felt that they were more expert at it than their English cousins. In the third place, they had actually been expanding beyond the limits prescribed by the mother country. In fact the restrictions of the mother country upon the westward movement constituted one of their grievances and in their opinion were in some instances a violation of their charter rights. They had already learned the lesson of manifest destiny and under the efficient tutelage of the Father of their country were rather inclined to profit from its teachings. The desire for territory was so strong that Virginia in the midst of the Revolutionary War was willing to hazard its successful outcome for the Americans by making an expedition to the Northwest to seize this territory. Finally, the treaty of peace in 1783, fixing the foothills of the Alleghanies as the western boundary of the new nation, extended the limits of the states beyond their actual settlements and thus created for the Americans a field for expansion. While the American commissioners at Paris had modestly asked the mother country for Canada, they were, however, as a first step reasonably satisfied with their achievement. There was remaining at least one important question for settlement before the westward movement already well under way could be orderly directed: who was to umpire the game, the states or the Union?

<sup>1</sup> Territories is used in contradistinction to the states of the Union to include all the possessions of the United States, whether incorporated or unincorporated. Protectorates refers to those Caribbean and Central American States in whose affairs the United States has intervened at various times.

## II. THE CREATION OF THE NATIONAL DOMAIN

Possibly the two strongest forces in preserving the Union during the Confederation were the commercial ties and the common interest in the western lands. Of the two, the latter was the more powerful though a more silent factor in creating a unity of interest among the states. While the western lands were claimed by a few states, they were generally regarded as a common possession resulting from a united struggle for independence. If the western territory was to be retained and properly administered only two solutions of the problem were possible: (1) either to allow all the states to engage in a mad scramble for it with the prospects of innumerable conflicts and possible violence, (2) or to create it into a national domain to be defended by national forces and administered under national authority.

The solution of this problem was one of the most vital issues of American politics from 1778 to 1784. Congress at first seems not to have regarded the western lands as national property. In promising land grants to officers and soldiers during the war, it was careful to state that the money for procuring the lands would be assessed against the states. While the Articles of Confederation were under consideration by Congress a motion was made to insert a provision giving Congress the power to fix the western boundaries of the claimant states and to divide the western territory into independent states. This proposition was supported by only Maryland. There was, however, a provision in the Articles to the effect that "no state shall be *deprived* of territory for the benefit of the United States."<sup>2</sup> When Virginia in 1778 conquered the Northwest and it suddenly appeared that she would have almost unlimited territorial wealth, the issue assumed a more formidable aspect. By this time all of the states except Delaware, New Jersey, and Maryland had ratified the Articles of Confederation, but several of them had ordered their delegates in Congress to propose alterations before signing. These three states refused to sign the Articles after failing to secure the adoption of an amendment making the western territory national property. New Jersey, 1778, and Delaware, 1779, signed the Articles with the protest that they should share in the territory which had been won "by the blood and treasure of all." Maryland, however, formally instructed her delegates December 15, 1778, not to sign the Articles unless they were amended so that western territory

<sup>2</sup> Art. IX.



"should be considered as a common property, subject to be parceled out by Congress into free, convenient and independent governments, in such manner and at such times as the wisdom of that assembly shall hereafter direct."

This is the first official proposal of a policy for the administration of the western territory which was later adopted by the nation and made the basis of building a greater Union of autonomous states. Maryland stood like a stone wall for three anxious years while the Articles remained in escrow. Virginia tried to force her hand by formally offering to put the Articles into effect with any one or more states which would join her, but Maryland refused to be coerced by such methods and, by showing the northern states that Virginia's claims, if allowed in full, would nullify theirs, was finally able to turn the tables against Virginia and have her way. New York led the procession by instructing her delegates in Congress, February 19, 1780, to agree to a western boundary and to relinquish her claim to any further territory. Congress took advantage of this precedent and passed a resolution September 6, 1780, urging the other claimant states to follow the example of New York and requesting Maryland to sign the Articles. Congress immediately followed with another resolution, October 10, 1780, adopting the policy originally proposed by Maryland and promising that all ceded territory would be "formed into distinct republican states, which should become members of the Federal Union, and have the same rights of sovereignty, freedom and independence as the other states."

It soon became evident that all the claimant states would comply with the request of Congress and meet the demand of Maryland which, without waiting for their action, signed the Articles, March 1, 1781. The cessions of the claimant states were accepted by Congress as follows: New York, 1782; Virginia, 1784; Massachusetts, 1785; Connecticut, 1786; South Carolina, 1787; North Carolina, 1790; Georgia, 1802. Thus through a series of tedious events and anxious years, the Union was constitutionalized, a national domain was created, and the principles for its administration and admission into the Union as states were adopted.

### III. THE FEDERAL PRINCIPLE AND THE TERRITORIES

For a nation to commit itself to the policy of developing its dependent territory into self-governing units to be admitted into the ranks of its original members on a basis of absolute equality

marked a radical departure in the field of colonial administration. The extension of the federal principle to the territories was from the point of view of theory the logical completion of a scheme for an imperial order which Great Britain had failed to develop but which she has since initiated in the development of her self-governing dominions. The application of this principle to our territorial possessions in the building of the nation can scarcely be regarded as less significant than its adoption for the Union of the original thirteen states.

This contention is amply sustained by the fact that the Union now consists of forty-eight states. Five of these, Vermont, Kentucky, Tennessee, Maine, and West Virginia, were formed from the original thirteen, twelve from territory originally claimed by them, and eighteen from territory acquired by the Union from foreign nations. All of the states except the original thirteen, Vermont, Kentucky, Maine, Texas, California, and West Virginia, have occupied the territorial status. Even those states which were fortunate enough to be admitted into the Union without the territorial apprenticeship secured their equality in the Union from the application of this principle.

#### IV. POWER OF THE UNITED STATES TO ACQUIRE TERRITORY

1. *Under the Articles of Confederation.* The Articles of Confederation contained no provision granting Congress the power to acquire territory; in fact, as we have already stated, an attempt to insert such a provision was defeated ten to three. Congress, nevertheless, accepted the cessions from the claimant states. Three theories have been advanced to justify this action of Congress: (1) that the nation really possessed the western territory by virtue of the Treaty of 1783: that Great Britain granted this territory to the United States and not the separate states claiming it; that Congress merely satisfied the pride of the claimant states in tolerating their contentions until common sense could assume the throne; and that the states in relinquishing their claims recognized this fact; (2) that, if the Confederacy did not have the power to acquire territory, the cessions of the states accomplished by their delegates in Congress under instructions from the claimant states and approved by the delegates of all the states amounted to a grant of this power;<sup>3</sup> (3) that the necessity of

<sup>3</sup> Of course, the grants of North Carolina and Georgia were accepted after the Constitution went into effect and have never been questioned.

the situation and public interest compelled Congress to accept the cessions of the claimant states as a means of preserving the Union. The last contention seems to be the most tenable position. Madison, in speaking of the powers exercised by Congress over this territory, said: "I mean not by anything here said to throw censure on the measures which have been pursued by Congress. I am sensible they could not have done otherwise. *The public interest, the necessity of the case*, imposed upon them the task of *overleaping their constitutional limits*. But is not the fact an alarming proof of the danger resulting from a government which does not possess regular powers commensurate to its objects? A *dissolution or usurpation* is the dreadful dilemma to which it is continually exposed."<sup>4</sup>

2. *Under the Constitution.* The Constitution does not specifically grant the United States the power to acquire territory but it does provide that "the Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or of any particular state."<sup>5</sup> Here is a recognition of the title of the United States to the territory already under its control and of claims to additional territory which might come into its possession. In other words, the right to acquire territory under the existing claims seems to be recognized.

The power of the United States to acquire territory was seriously questioned by Jefferson when he was considering the purchasing of Louisiana in 1803. He was finally convinced by Gallatin, his Secretary of the Treasury, that it could be done by treaty. In reply to a letter from Gallatin to this effect, he replied: "You are right, in my opinion. There is no constitutional difficulty as to the acquisition of territory, and whether, when acquired, it may be taken into the Union by the Constitution as it now stands will become a matter of expediency."<sup>6</sup>

It is now generally agreed that the power of the United States to acquire territory may be derived from the following sources: (1) the treaty-making power, (2) the war powers, (3) the power to admit new states into the Union, and (4) the right of discovery and occupation accorded to sovereign states by international usage.<sup>7</sup>

<sup>4</sup> *The Federalist*, No. 38.

<sup>5</sup> Art. IV, Sec. 2.

<sup>6</sup> *Writings of Gallatin*, I, 113.

<sup>7</sup> W. W. Willoughby, *The Constitutional Law of the United States*, I, 325.

In 1828, Chief Justice Marshall said: "The Constitution confers absolutely upon the government of the Union the power of making war and of making treaties; consequently that government possesses the power of acquiring territory by conquest or treaty."<sup>8</sup> This opinion has been repeatedly sustained by the Supreme Court.<sup>9</sup> It is only by implication that the right to acquire territory may be derived from the power to admit states into the Union. If this power had been the sole basis for acquiring territory, Jefferson's scruples would have rested on a stronger constitutional foundation. In the field of international relations the government of the United States is the only agent that can act for the nation and by the Constitution has exclusive control over our foreign affairs. It apparently, therefore, must be regarded as having control of whatever subject matter international law and practice regard as properly falling within this field; otherwise the nation would be seriously handicapped in dealing with foreign powers. "The United States are a sovereign and independent nation," said Justice Gray, speaking for the Supreme Court, "and are vested by the Constitution with the entire control of international relations, and with all the powers of government necessary to maintain that control and make it effective."<sup>10</sup>

## V. THE METHODS FOR ACQUIRING TERRITORY

The methods by which the power to acquire territory has been exercised as illustrated in our territorial expansion are: (1) by statute; (2) by treaty; and (3) by joint resolution of both houses of Congress. The first method was used in the case of the Guano Islands in 1856. The second, which is the one generally employed, was used to acquire Louisiana Territory (1803), Florida (1819), Mexican cessions (1848), Gadsden purchase (1853), Alaska (1867), Porto Rico and the Philippines (1898), Samoan Islands (1899), Panama Canal Zone (1904), and the Virgin Islands (1917). The third was employed to annex Texas (1845) and Hawaii (1898).

The constitutionality of these annexations has never been contested for the reason that the territorial extent of the sovereignty of the United States is a political question and is, therefore, not

<sup>8</sup> *American Insurance Co. v. Canter* (1828), 1 Peters 511.

<sup>9</sup> See *Fleming v. Page* (1850), 9 Howard 603; *Stewart v. Kahn* (1870), 11 Wallace 493; *United States v. Huckabee* (1872), 16 Wallace 414; and *Wilson v. Shaw* (1907), 204 U. S. 24.

<sup>10</sup> *Fong Yue Ting v. United States* (1893), 49 U. S. 698.



subject to judicial determination. The decisions of the President and Congress in such matters are not reviewable by the courts. The annexation of Texas was attempted by treaty but failed for a lack of the necessary two-thirds of the Senate. The same end was secured by a joint resolution which required only a simple majority of both houses with Presidential approval. The action of Congress in this instance not only placed Texas under American sovereignty but admitted her into the Union. In the latter matter Congress was clearly on constitutional grounds.<sup>11</sup> Of course, the Supreme Court has indirectly recognized the constitutionality of these annexations by enforcing federal laws within their limits.

## VI. THE POWER OF CONGRESS TO GOVERN TERRITORY

While the Articles of Confederation gave Congress no authority to govern territory, circumstances compelled it to do so. It was, therefore, merely recognizing a situation of fact, when Congress was granted by the Constitution the power to make all needful rules and regulations respecting the territory belonging to the United States. If we concede the power of the United States to acquire territory, then it would follow that Congress has the power to legislate for it. It has also been negatively argued that since the power must exist somewhere and does not belong to the states, it is necessarily possessed by the national government.<sup>12</sup> Congress then has both expressed and implied powers for the governing of territories and is absolute in their exercise.<sup>13</sup> Speaking for the Supreme Court, Chief Justice Waite said: "Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the territorial legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of the territories and all the departments of the territorial governments. It may do for the territories what the people, under the Constitution of the United States, may do for the States."<sup>14</sup> This absolutism of Congress does not extend to the civil rights of the inhabitants of a territory. In this matter Congress is impliedly subject to limitations in favor of personal rights.

<sup>11</sup> Willoughby, *op. cit.*, I, 344-350.

<sup>12</sup> *American Insurance Co. v. Canter* (1828), 1 Peters 511, 542.

<sup>13</sup> *Sere v. Pitot* (1910), 6 Cranch 332.

<sup>14</sup> *National Bank v. County of Yankton* (1879), 101 U. S. 129.

## VII. THE CLASSIFICATION OF TERRITORIES

1. *As to constitutional status*, the United States has been divided into three parts: (1) the Union of States, (2) incorporated territories, and (3) unincorporated territories. An incorporated territory is a part of the Union and the constitutional guarantees and general revenue laws apply to its inhabitants. An unincorporated territory, while it belongs to the United States and is under its sovereignty from an international point of view, is not in the strictest constitutional sense a part of the Union. The constitutional status of this class of territories is still a matter of judicial determination. Of course, the Thirteenth and Eighteenth amendments automatically extend to all territory under the jurisdiction of the United States. It has been held, however, that the general revenue laws<sup>15</sup> and the right of trial by jury<sup>16</sup> do not apply to unincorporated territories. Incorporation results from the expressed or implied action of Congress and the extent to which incorporated territory may claim the protection of the Constitution depends upon the facts peculiar to each case.<sup>17</sup> The distinction between incorporated and unincorporated territories is, therefore, fundamental as it determines very largely the constitutional rights of their inhabitants.

2. *As to political status* territories are organized and unorganized. This classification is less important and in no way involves their constitutional status. An incorporated territory might be of either type. In fact the distinction between organized and unorganized territory has never been authoritatively and technically drawn. In general, the distinction is that the organized territory possesses a government modeled along the lines of our state governments, consisting of a legislative, a judicial, and an executive department, though Alaska was held to be an organized territory in 1904 without possessing a local legislature.<sup>18</sup> However, in a more recent case the Supreme Court evaded the question of organization, stating that incorporation and not organization was the test to be applied. It would appear, therefore, that the distinction between organized and unorganized territory is without constitutional importance and has, apparently, no definite connotation.

<sup>15</sup> *Downes v. Bidwell* (1901), 182 U. S. 244.

<sup>16</sup> *Hawaii v. Mankichi* (1903), 190 U. S. 197.

<sup>17</sup> *Dorr v. United States* (1904), 195 U. S. 138.

<sup>18</sup> *Binns v. United States* (1904), 194 U. S. 486.

## VIII. THE NATURE OF TERRITORIAL GOVERNMENTS

Territorial governments are either Presidential or Congressional. Prior to Congressional action establishing a civil government for an annexed territory, it is under the control of the President, acting under his authority as commander-in-chief of the army and navy or in obedience to his oath of office to enforce the laws of the United States. Presidential government of territories may be either military or civil in character. It is usually temporary and military in character and covers a sort of an interregnum while Congress is preparing to act. Presidential government becomes civil in character only by Congressional action, either by establishing such a government without formally organizing it or by authorizing the President to institute civil government, leaving in either case its organization and administration in the hands of the President. After such action by Congress, the President ceases to act as commander-in-chief and becomes a civil administrator. Congress may, however, establish a military government for a territory, if in its discretion this type of control is best suited to its conditions, and thus extend the period of military control by the President.

Presidential government of a territory, whether military or civil, is subject to disestablishment by Congress at its discretion. It is entirely a matter of expediency and is exclusively administrative in character. During its continuance, the local law of the territory, the civil rights of its inhabitants, and local administration are preserved in so far as the interests of the territory will permit.

Territorial governments established by Congress are its agents in the same sense as any board or commission created by it to operate within the territorial limits of the Union. "They are," according to the Supreme Court, "legislative governments, and their courts legislative courts, Congress, in the exercise of its powers in the organization and government of the territories, combining the powers of both the federal and state authorities. There is but one system of government or of laws operating within their limits, as neither is subject to the constitutional provisions in respect to state and federal jurisdiction. They are not organized under the Constitution, nor subject to its complex distribution of powers of government, as the organic law; but are the creation, exclusively, of the legislative department, and subject to its supervision and control."<sup>19</sup> They do not have to be republican in form nor do the

<sup>19</sup> *Benner v. Porter* (1850), 9 Howard 235.

local inhabitants have to be given the right of participation in their establishment or operation.

#### IX. EVOLUTION OF THE NORMAL TERRITORIAL GOVERNMENT

The first official expression of Congress on what its policy would be toward the administration of territories was its promise of 1780 that they would ultimately be admitted to statehood. The first legislation by Congress for the control of territories was the Ordinance of 1784 framed by Jefferson. While it never went into effect, it contained two of the fundamental principles that have operated in the administration of our continental territories: (1) a democratic form of territorial government and (2) ultimate statehood and equality with the older states. These principles were embodied in the Ordinance of 1787, which established a territorial government for the Northwest Territory.

It provided for two types of territorial government: one executive and the other legislative in character. The executive type provided for a governor, a secretary, and three judges appointed by Congress with the governor and judges exercising a limited power of legislation. This form of control was to operate until the territory possessed five thousand free male inhabitants of voting age. It was then to be superseded by the legislative type, which was more democratic in form, adding to the governor and judges appointed by Congress, a legislature consisting of a Council, appointed by Congress, and a House of Representatives elected by the qualified voters. The territory was also to be represented in Congress by a delegate who could participate in the debate on measures relating to the territory but could not vote. After the adoption of the Constitution the Ordinance was modified in 1789, substituting the appointive power of the President for that of Congress, and with this change it was practically duplicated by Congress in 1790 for the government of the Southwest Territory. The Ordinance of 1787 contained three important features: first, a bill of rights similar to those found in the state constitutions; second, a plan for the immediate and temporary government of the territory; third, a promise of full membership in the Union of States.<sup>20</sup>

Beginning with this piece of constructive legislation of the Confederation, second in importance only to the Constitution itself,

<sup>20</sup> W. F. Willoughby, *Territories and Dependencies of the United States* (1905), 27-52.



Congress required a half century to complete the structure of the fully organized territorial government, which may be said to embody the following features:

(1) A governor appointed by the President by and with the advice and consent of the Senate for a term of four years and exercising the usual powers of a state governor such as law enforcement, the veto, and command of the territorial militia.

(2) A territorial secretary, similarly appointed, who keeps the records of the territory, sends copies of them to the President and other national officials, and acts as governor in case of his absence or a vacancy.

(3) A legislature consisting of two houses elected by the qualified voters for a term of two years, meeting biennially, and having the power to override the governor's veto by a two-thirds majority.

(4) A judiciary consisting of a supreme court composed of a chief justice and two or more associate justices, and district courts composed of the same justices sitting separately. The judges together with a prosecuting attorney and a marshal for each territory are appointed by the President with the approval of the Senate for a term of four years. Appeals may be taken from the district courts to the supreme court of the territory and finally to the Supreme Court of the United States.

#### X. THE ADMISSION OF TERRITORIES INTO THE UNION AS STATES

There are two processes which territories may follow in taking the preliminary steps to statehood. A territory may on its own initiative hold a constitutional convention, write a constitution, submit it to its voters for approval, and, if it is approved, apply to Congress for admission. Not a few states, including Arkansas, Michigan, Oregon, Idaho, and Wyoming, followed this method. The pursuing of this method does not prevent Congress from requiring that certain provisions be inserted in the proposed constitution before admission is granted. The more usual method is for the people of the territory to petition Congress for admission and for Congress, if it approves the petition, to pass "an enabling act," authorizing the territory to hold a constitutional convention and stating the conditions for admission. When the conditions of the act of admission, which must be passed by Congress and approved by the President, have been met, the President by proclamation, if empowered in the act of admission to do so, or Congress

by resolution, declares the territory a member of the Union of States.<sup>21</sup>

All of the continental possessions of the United States have become states except Alaska. Since the acquisition of non-contiguous and insular territories, whether the United States would continue its former and traditional policy of granting statehood to its possessions, has been a matter of debate. Should Alaska, Hawaii, the Philippines, Porto Rico, and the Virgin Islands become states of the Union even if their inhabitants were willing? From the point of view of transportation and communication there can be no serious objection to such action, but there are involved such problems as education, language, immigration, labor, and citizenship, which are more serious. It would seem that Alaska and Hawaii might in the course of time be seriously considered for statehood and that the others should be granted increased autonomy as conditions warrant, with the ultimate end of independence in view under proper guarantees by the United States.

## XI. OUR PRESENT TERRITORIAL GOVERNMENTS

There are only two fully organized territories: Alaska and Hawaii, which possess governments with executive, judicial, and legislative departments and whose inhabitants are citizens of the United States. The governor and judges in each are appointed by the President with the approval of the Senate for a term of four years. In Hawaii, the Attorney-General and Treasurer of the Territory are appointed by the Governor and the territorial Senate.

In each the legislature is bicameral, consisting of a Senate and a House of Representatives, whose members are elected by popular vote. In Alaska, the Senate consists of eight members, two from each of four districts, and the House of sixteen members, four from each district. The Senators hold office for four years and the Representatives for two. In Hawaii, the Senate is composed of fifteen members elected for four years and the House of thirty members elected for two-year terms.

Their legislatures meet biennially in regular session and exercise such legislative powers as are not inconsistent with the Constitution and laws of the United States. Their acts are subject to the governor's veto, which may be overridden by a two-thirds majority of both houses of the legislature. In Hawaii, however, if

<sup>21</sup> See James Bryce, *American Commonwealth*, I, 585-595.

the budget, which is an executive proposal, fails to be approved by the legislature, the budget of the preceding year remains in effect, as a means of guaranteeing the effective operation of the government.

The voters in each must be American citizens, twenty-one years of age, residents for one year, duly registered as voters, and able to read, speak, and write the English language, except that in Hawaii its language may be substituted. Each territory is represented at Washington by a delegate elected by its voters for a term of two years. He is paid from the national treasury and enjoys all the privileges of a member of the House of Representatives except the right to vote.

Our most important partially organized territories are Porto Rico and the Philippines. In most respects their governments are similar to those of the fully organized territories; their acts, however, are subject to a more rigid supervision by Congress. In Porto Rico there is a governor and in the Philippines a governor-general appointed by the President with the advice and consent of the Senate for a term of four years. The judges of their supreme courts are appointed by the President and Senate, but those of their lower courts are appointed by their executives and territorial senates.

The legislature of each consists of a Senate and a House of Representatives elected by popular vote. In Porto Rico, the Senate is composed of nineteen members and the House of thirty-nine members, both Senators and Representatives holding office for four years. In the Philippines the Senate consists of twenty-four members, twenty-two of whom are elected for a term of six years, one-half retiring every three years, and the House contains ninety representatives, of whom eighty-one are elected for a term of three years. Two Senators and nine Representatives are appointed by the governor-general to represent the non-Christian districts of the islands.

The acts of the legislatures of Porto Rico and the Philippines are subject to the veto of their executives with the usual provision that the veto may be overridden by a two-thirds majority of both houses of the legislature. However, if their executives still refuse their approval after such action by the legislature, the measure in question must be presented to the President, who is, in case of a Porto Rican measure, given three months and a Philippine measure six months for approval. Failure on his part to act within these limits amounts to approval. Furthermore, all the acts of these legislatures are subject to amendment by Congress, though such action

is very infrequent. Budgetary measures are safeguarded in these territories by the provision that the budget of the previous year is considered reenacted if the legislature fails to make adequate provision for the government by the close of the fiscal year.

Corresponding to the delegates of the organized territories at Washington, Porto Rico and the Philippines have commissioners, the former one and the latter two, who are popularly elected for terms of four and three years respectively and have a voice but not a vote in the House of Representatives.

Porto Ricans were made citizens of the United States in 1917; the Filipinos are American nationals but not citizens. Since 1906 citizens of Porto Rico, twenty-one years of age, resident for one year, and able to read and write, have exercised the suffrage. Suffrage in the Philippines is restricted to the male inhabitants, twenty-one years of age, resident for one year, and able to read and write Spanish, English, or a native language, provided (1) they are not citizens or subjects of any foreign country and (2) were legal and actual voters in 1916, or own real estate valued at five hundred pesos, or pay taxes amounting to fifty pesos annually. A more liberal suffrage must await further experience.

The government of the Philippines from the beginning has been characterized by two motives on the part of the American people: (1) to govern the Islands as efficiently and sympathetically as was compatible with existing conditions; and (2) to grant home rule as rapidly as circumstances would warrant with a view of ultimate independence. It is generally considered that this policy has been honestly pursued by the American government, not without errors, but possibly in as able manner as it has managed home affairs. From a military government at first, the status of the Islands has been modified until under the Jones Act of 1916 they received a rather liberal form of government and a promise of independence as soon as conditions justified the step. In the solution of this problem facts should dictate rather than politics; the interests of the inhabitants of the Islands rather than those of individuals or groups of individuals in the United States.<sup>22</sup>

<sup>22</sup> An immense amount of literature may be found on this subject, most of which, however, is more enthusiastic than scientific. See *Current History*, XV, 678-694; XIX, 275-280; XX, 936-942; XXI, 866-872; XXV, 722-726; *Foreign Affairs*, V, 114-131, 459-471, 579-588; *Am. Pol. Sci. Rev.*, XVIII, 285-296; M. M. Kalaw, *The Case for the Filipinos* (1916), and *Self-Government in the Philippines* (1919); and F. B. Harrison, *The Cornerstone of Philippine Independence: A Narrative of Seven Years* (1922).



The Virgin Islands, Panama Canal Zone, Samoa, and Guam are under the control of the President. In 1917, Congress empowered the President with the advice of the Senate to appoint a governor and such other officials as he thought necessary to govern the Virgin Islands, exercising such powers as he might direct. Local administration is preserved in the Islands as far as practicable and American citizenship was granted their inhabitants by Congress in 1927. The Canal Zone since 1913 has had a governor appointed by the President and Senate for four years and a judiciary consisting of magistrates' courts and a district court; the latter exercises criminal, civil, equity, and admiralty jurisdiction. Its judge, together with a district attorney and marshal, is appointed by the President and Senate for four years. Provision has also been made for the establishment of organized towns in the Zone. Civil government has not been established by Congress for Samoa, Guam, and the other smaller islands such as the Midway, Howland, Baker's, and Guano islands. They are governed by the President through the Navy Department which designates naval officers for their governors.

The District of Columbia, the seat of the government of the United States, constitutes an area of seventy square miles ceded by Maryland and is by the Constitution under the exclusive jurisdiction of Congress, which has not granted home rule to its inhabitants but acts as a local legislature for the District just as the state legislatures for the states. Since 1878, the executive authority of the District has been exercised by a commission of three persons, one an army engineer and the other two civilians appointed by the President and Senate. With the exception of the judges of the courts of the District and the members of the board of charities, who are appointed by the President and Senate, the commissioners appoint the subordinate officials of the District and supervise the administration of its affairs. Its schools are under the management of a board of education appointed by the judges of its Supreme Court.

Its half-million inhabitants are not only disfranchised in the government of the District, since there are no popularly elected officials, but unless they have a legal residence in some one of the states, they are also disfranchised in the election of national officials. Despite this anomaly, the government of the District has been reasonably efficient and sensitive to public opinion. In 1926, the House Committee on the Affairs of the District adopted the practice of submitting its bills concerning the District to an advisory

council of citizens representing its civic organizations.<sup>23</sup> This is a step in the right direction.

The government of the United States since the Spanish-American War has exercised considerable influence over several Caribbean and Central American states, which in some respects may be regarded as protectorates of the United States. During this period, at one time or another, our government has intervened by armed force in the affairs of Cuba, Haiti, San Domingo, Nicaragua, and Honduras, to supervise elections, or protect life and property in times of insurrection, or to stabilize their finances as a protection to foreign bondholders whose governments were threatening intervention. Frequently this action has taken place at the invitation of the governments of these states, but broadly speaking, it has rested on the following grounds: (1) treaties made between the United States and Cuba, Haiti, and San Domingo; (2) the doctrine of intervention recognized and justified in certain instances by international law; and (3) the Monroe Doctrine, which is internationally recognized as establishing a community of interests in the western hemisphere and for the interpretation and administration of which the United States has rightly or wrongly assumed the sole responsibility. The compass of this subject does not permit its pros and cons to be properly treated in this connection.<sup>24</sup>

While the administration of our continental territories has on the whole been satisfactory, it is unfortunately true that such favorable comment would not accurately characterize our management of the affairs of the insular territories. There are several reasons for this, some of which are mitigating in their nature, while others are critical in character. In the first place, the problem was essentially different. The inhabitants of the continental territories were colonists from the United States, experienced in self-government and familiar with the language, customs and ideals, and legal system of the nations, while those of the Islands were foreigners and accustomed to a radically different type of institutions and culture. There was, politically speaking, no special need for

<sup>23</sup> For additional material on the government of the District, see W. F. Dodd, *The Government of the District of Columbia* (1909); J. S. Gallagher, *The Government of Washington* (1923); *Nat. Mun. Rev.*, XII, 577-580; XV, 579-582; and *Pol. Sci. Quar.*, XXV, 257-270.

<sup>24</sup> See F. Hurst, *Whose Country is Haiti?* (1922), F. Bausman, *Seizure of Haiti by the United States* (1922); *Am. Hist. Rev.*, XV, 885-896; XXII, 734-742; XXIII, 67-70, 371-377; *World's Work*, LI, 77-84, 210-218, 321-328.

education and experience in the one instance but a complete transformation was necessary in the other. In the next place, the United States never deliberately entered the game of imperialism. It is undoubtedly distasteful to the American people. It was a set of unforeseen circumstances that forced the United States to take possession of territory as means of doing justice to its inhabitants. There were individuals and groups of individuals who were not so altruistically actuated, but there was undoubtedly a strong humanitarian motive back of the nation's action in the acquisition of the Spanish possessions following the war with Spain. It was felt that to leave the inhabitants of these islands under the control of Spain amounted to the loss of the war and that to grant immediate independence was folly. It seems that the logical and inevitable result of the conflict with Spain was not anticipated. Finally, it appears that the United States has never decided to remain in the imperial game, and, therefore, has never established a well-planned policy for the management of these territories nor provided for trained and experienced administrators to execute it. For this sin of omission the nation is subject to criticism.

The administration of our territories is now divided between the Departments of War, Navy, and Interior. It is a systemless system, whatever that means, and, waiving the matters of competency, efficiency, and economy, its lack of unity prevents continuity of policy, effective supervision, and the development of a professionalized colonial service. War lords, navy swashbucklers, and economic freebooters are not likely to qualify as formulators of policies for civil government or as expert administrators. Most of the governments of the world having the responsibility of governing dependent territory have made definite provision by the establishment of colonial offices to give as nearly as possible a scientific character to their colonial administration. It has been suggested and ably argued that the United States should establish a Bureau of Territories and Dependencies in the Department of State, to be composed of experts and to give its attention to the study of the problems of our territories, to advise Congress and the President in these matters, and to supervise their administration.<sup>25</sup>

<sup>25</sup> For an elaboration of this proposal, see W. F. Willoughby, *Reorganization of the Administrative Branch of the National Government*, 60-61.

## CHAPTER XXVII

### FEDERAL CENTRALIZATION

THEODORE ROOSEVELT, at Harrisburg, Pennsylvania, October 4, 1906: "... we need, through executive action, through legislation, and through judicial interpretation and construction of law, to increase the power of the Federal government."

CALVIN COOLIDGE, at Williamsburg, Virginia, May 15, 1926: "... no plan of centralization has ever been adopted which did not result in bureaucracy, tyranny, inflexibility, reaction and decline."

#### I. THE PROBLEM OF FEDERALISM

A significant change is taking place in our governmental system. We are reminded almost daily by public men and the press that the relationships between the states and the nation are undergoing sweeping readjustments—that authority is deserting the capitals of the forty-eight commonwealths and concentrating itself at Washington.<sup>1</sup> Powers formerly exercised exclusively by the states are being shared with, or entirely appropriated by, the central government. Opinion is sharply divided over the issue. The nationalists declare that the Constitution, broadly construed, justifies congressional action to advance the welfare of the whole country;<sup>2</sup> the states' rights leaders insist that ours is "an indestructible union of indestructible states" and that the interests of the people can best be served by maintaining the principle of local self-government.<sup>3</sup>

A late writer, wishing to emphasize the importance of the present

<sup>1</sup> For bibliography, see Lamar Taney Beman, *Selected Articles on States Rights* (1926).

<sup>2</sup> Theodore Roosevelt, "The New Nationalism," 97 *The Outlook*; W. C. Redfield, "Federal Usurption," 73 *Forum*, 88-95; C. E. Grinnell, "Lest We Forget," 42 *Am. L. Rev.*, 115 (views of Charles W. Eliot).

<sup>3</sup> L. Rogers, "The Constitution and the New Federalism," 188 *North Am. Rev.*, 321-335; J. S. Williams, "Federal Usurpations," 32 *Ann. of the Am. Acad.*, 185-211; C. Beals, "State Governors Challenge Federal Encroachments," 22 *Cur. His. Mag.*, 793-795.



tendency, has called it The New American Revolution.<sup>4</sup> While certain of its phases are peculiar to our day, the phenomenon is more broadly a development extending over our entire history. "The question of the relation of the states to the federal government is the cardinal question of our constitutional system," said Woodrow Wilson in 1908. "At every turn of our national development we have been brought face to face with it, and no definition either of statesmen or of judges has ever quieted or decided it. It cannot, indeed, be settled by the opinion of any one generation, because it is a question of growth, and every successive stage of our political and economic development gives it a new aspect, makes it a new question."<sup>5</sup> The issue is constantly recurring because it is inherent in our federal system, which seeks to reconcile national control with local autonomy.

Lord Bryce has given us a penetrating study of the present problem. He has pointed out that there is an inevitable conflict between the centrifugal, or decentralizing, and the centripetal, or unifying, forces in a state. Confederations have risen or fallen because of their ability or inability to hold their several units together in the persistent struggle of local factions which threaten dissolution.<sup>6</sup> The United States, he has declared, is a striking example of the final victory of nationalism as against particularism, the result being achieved largely because our Constitution, while recognizing the centrifugal forces and leaving them free play, threw its weight in the scale of the centripetal, in that it was framed in terms broad enough to allow the central government to increase its powers from time to time as necessary.<sup>7</sup>

## II. THE UNIFYING FORCES

The Constitution, however, does not explain the basic causes of consolidation in this country. These causes are deep-seated and complex and go to the heart of our social and institutional development. They were initiated when the first English settlements were made along the Atlantic seaboard and they persist in the intricate economy of our present-day life. It is possible in this connection to give only a brief consideration to the major forces which have established "a more perfect union."

<sup>4</sup> Nicholas Murray Butler, *The Faith of a Liberal* (1924), Ch. XIX.

<sup>5</sup> "The State and the Federal Government," 187 *North Am. Rev.*, 684.

<sup>6</sup> *Studies in History and Jurisprudence* (1901), 223-262.

<sup>7</sup> *Ibid.*, 250-257.

(1) The English colonists, who laid the foundations of our present system, were from the beginning bound together by close ties of blood, language, tradition, and custom. Theirs was a real community of interest, safely anchored in the political and social experience of their race. This mutuality and interdependence was accentuated by the common problems which they faced in the new world. In their constant warfare with nature and the savage, they were drawn together in a common accord.<sup>8</sup>

(2) The governments which appeared in the colonies were based on the English pattern, and notwithstanding their variety in details, they were basically alike, each providing for a single executive, a legislature, a distinct judiciary, and a system of common law. As the historian Green remarked, "The colonists proudly looked on the constitutions of their various States as copies of the mother country. England had given them her law, her language, her religion, and her blood."<sup>9</sup>

(3) The colonists remained politically united to England from 1606 to 1783, a period of one hundred seventy-seven years, during which they were subjected to varying degrees of central control from London. Although distance, difficulty of communication, and shortsightedness of governing officials prevented the enforcement of a consistent policy, legal control was technically maintained, the colonists were protected from foreign influences or designs, and were given the opportunity of developing indigenous institutions.<sup>10</sup>

(4) Meanwhile a movement looking toward closer association on the part of neighboring communities was frequently debated and at times expressed itself in both organizations and action.<sup>11</sup> After 1700, there developed a constantly growing sentiment for a continental confederation under the British Crown, for the organization of which such men as William Penn, Robert Livingston, and Benjamin Franklin made proposals.<sup>12</sup>

(5) Mutual opposition of the colonies to the economic policies of the mother country led to their common protest and ultimately to their alliance against her in the Revolution. A provisional government was established by the Continental Congress of 1775,

<sup>8</sup> C. E. Stevens, *Sources of the Constitution of the United States* (1894), 4-8.

<sup>9</sup> J. R. Green, *A History of the English People* (Funk and Wagnalls, n. d.), IX, 217, § 1440. Quoted by Stevens, *op. cit.*, 26.

<sup>10</sup> E. B. Greene, *Provincial America* (1905), Chs. IV and V.

<sup>11</sup> B. Long, *Genesis of the Constitution of the United States of America* (1926), 45-57.

<sup>12</sup> See Ch. III.

which with considerable difficulty brought the war to a successful close. It was March 1, 1781, before the Articles of Confederation, framed in 1777, were finally put into effect by the ratification of the one remaining state, Maryland.<sup>13</sup>

(6) The "Critical Period" of our history almost disrupted the Confederation. During the years 1783-1789 the centrifugal tendencies mentioned by Bryce had free play. It seemed that the new republic would be torn to pieces by the jealousies of the states. This result, of course, was prevented by the intervention of such nationalist leaders as Washington, Hamilton, and Madison, who saw the need for establishing a central government with sufficient authority to make its will effective.<sup>14</sup>

(7) The new Constitution adopted in 1788 laid the basis for a broad nationalism. The central government was given control of foreign and interstate commerce, of the monetary system of the country, of the treaty-making power, and of ample means for raising revenue. As Bryce says, "It turned what had been a League of States into a Federal State, by giving it a National Government with a direct authority over all citizens."<sup>15</sup>

(8) Fortunately the new government was set under way by friends of nationalism. Washington and Hamilton shaped their policies so as to invest the central authority with extensive powers and to bring the people directly under its influence.<sup>16</sup> John Marshall, who was appointed Chief Justice of the United States by Adams, contributed much to the cause of nationalism by his vigorous decisions upholding the right of the federal government to exercise extensive powers which were not expressly granted by the Constitution.<sup>17</sup>

(9) Political parties, formed under the leadership of Hamilton and Jefferson, soon developed an extra-constitutional governmental organism, which extended over the entire country without respect to state lines. These emphasized national issues and served to create a sentiment of national unity. The election of the President

<sup>13</sup> James Bryce, *American Commonwealth* (Rev. Ed., 1910), I, 19-20.

<sup>14</sup> John Fiske, *The Critical Period of American History* (1898), *passim*.

<sup>15</sup> *American Commonwealth*, I, 32. It is important in this connection not to overlook the basic economic forces at work to secure the adoption of a Constitution which would protect property interests, commerce and trade, and remove the control of the currency from the States, which had been too prone to issue worthless paper money. See C. A. Beard, *An Economic Interpretation of the Constitution of the United States*, *passim*.

<sup>16</sup> W. S. Culbertson, *Alexander Hamilton* (1911), 57.

<sup>17</sup> A. J. Beveridge, "The Development of the Constitution under John Marshall," 56 *Am. L. Rev.*, 921-948.

became a drama in which every voter could take an active part. State and local politics came to occupy a secondary position.<sup>18</sup>

(10) The expansion of the United States westward had a profound influence upon our national life. The frontier presented pressing problems—the slavery question, the tariff, the currency, internal improvements—which the national government was called upon to settle. Such issues attracted the attention of citizens throughout the country. Further, the frontier was settled by heterogeneous peoples, who, under the play of local conditions, were melted down and fused into Americans whose loyalty was not measured in terms of states' rights.<sup>19</sup>

(11) The Civil War tested the strength of the Union and vindicated the principle that it is indissoluble. The right of secession, claimed at various times by numerous states, both north and south, was given a death-blow.<sup>20</sup> The national government emerged from the war with added prestige and multiplied powers.

(12) During the past seventy-five years our social and economic life has undergone a striking change. Business, overleaping state boundaries, has become organized on a national scale. The concentration of factories in certain localities, the division of labor into highly specialized trades, and large-scale production have made the local communities of the United States interdependent to a marked degree. State laws have been inadequate to deal with the multitude of problems to which the industrial revolution has given rise. The national government has been obliged to interpose its authority to regulate business combinations, railways, telegraph lines, and the like in the interest of the public. The states are no longer the economic units which they were during our early history; they have become obsolete barriers to commercial progress.<sup>21</sup> State consciousness has rapidly declined. The national press inculcates common ideals and promotes a spirit of unity. Ease of communication draws us close together as a people. Government becomes centralized because a central authority is needed to deal with the vast number of common questions which confront the country.<sup>22</sup>

<sup>18</sup> Allen Johnson, "The Nationalizing Influence of Party," 15 *Yale Rev.*, 283-292.

<sup>19</sup> A. M. Schlesinger, *New Viewpoints in American History* (1922), 43-44.

<sup>20</sup> *Ibid.*, Ch. X.

<sup>21</sup> S. Leacock, "The Limitations of Federal Government," 5 *Proceedings Am. Pol. Sci. Ass.*, 37-52.

<sup>22</sup> Walter Thompson, *Federal Centralization* (1923), 305-327.



## III. THE CHARACTER OF THE FEDERALISM OF 1787

This summary of the causes of centralization in the United States shows that they are primarily social and economic rather than legal and political in character. It remains to examine them in connection with our federal scheme of government to determine the extent to which they have changed our constitutional system. Our national Constitution in its original form recognized the realities of existing social conditions and the strong attachments of the people to their local institutions. It provided that the central government should possess only such powers as were necessary to conduct the general affairs of the Union.<sup>23</sup> The several states were left in charge of those powers not granted to the federal government, or prohibited to them, or reserved to the people.<sup>24</sup> This division of powers reserved to the states, the "police power," or the authority to protect and promote the health, good order, morals, and general welfare of the people.<sup>25</sup>

The purpose of this arrangement, of course, was to preserve the advantages of local self-government, which should be responsive to the peculiar needs of each community and responsible to its citizens, and to provide for the coöperation of the states in matters of common interest. This principle of distribution of powers is the cornerstone of our federalism but it is more simple in theory than it is in application. It is, of course, recognized that a distribution of powers in harmony with the structure of the simple and highly individualistic society of 1787 would not fit the complex and competitive economy of today. Fortunately, the elastic phraseology of the Constitution and a comparatively easy process of amendment have made it possible to adjust the line of federalism to the changes wrought by the exigencies of national development. Chief Justice Waite stated the matter very clearly when he said that the powers granted to the national government are not confined in their operation to the instrumentalities "known or in use when the Constitution was adopted, but they keep pace with the progress of the country and adapt themselves to the new developments of time and circumstances. They extend from the horse and its rider to the stagecoach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad and from the railroad to the telegraph, as these new agencies are successively brought

<sup>23</sup> Art. I, Sec. 8; *McCulloch v. Maryland* (1819), 4 Wheaton 316, 405.

<sup>24</sup> Art. X of the amendments.

<sup>25</sup> *Keller v. United States* (1909), 213 U. S. 138.

into use to meet the demands of increasing population and wealth." <sup>26</sup>

#### IV. THE PROCESS OF CENTRALIZATION

The increase of federal authority under the Constitution, often at the expense of the states, has been accomplished by three methods: (1) by the liberal interpretation and expansion of certain clauses of the Constitution, of which those dealing with commerce, taxation, post offices and post roads, and treaty-making, are the most important; (2) by amendments, especially those adopted since the Civil War; and (3) by indirect means, for which no specific warrant can be found in the Constitution, as grants-in-aid to the states.<sup>27</sup> The first and second of these processes have been treated in connection with national revenues and expenditures.<sup>28</sup> It is, therefore, only necessary in this discussion to state the results which they have had upon federal relations.

1. *Centralization Through Judicial Interpretation.* The commerce clause which provides for the regulation of commerce with foreign nations, among the states, and with the Indians by Congress has been one of the chief means by which an extension of federal power has been effected. The net results of the use and interpretation of the commerce power upon federal relations may be briefly summarized as follows: (1) state laws may not interfere with the regulation of interstate commerce except when such interference is incidentally necessary to provide for the local welfare of the people; <sup>29</sup> (2) the Interstate Commerce Commission may fix the rates for both interstate and intrastate commerce; <sup>30</sup> (3) persons or corporations engaged in interstate business are subject to national control and protection; <sup>31</sup> (4) the national government may regulate labor (a) by requiring railroads whether they are engaged in interstate or intrastate commerce to use standard safety devices for the protection of their employees and passengers; (b) by settling disputes between the carriers and their employees through the Board of Mediation, and (c) by

<sup>26</sup> *Pensacola Teleg. Co. v. Western Union Teleg. Co.* (1878), 96 U. S. 1.

<sup>27</sup> Any classification must be somewhat arbitrary, because the authority for an act of Congress may be derived from several clauses of the Constitution.

<sup>28</sup> See Chs. XXII and XXIV.

<sup>29</sup> Reasonable state police regulations affecting interstate commerce only incidentally have been sustained by the Supreme Court. *Nashville C. & St. Louis Ry. Co. v. Alabama* (1888), 128 U. S. 96.

<sup>30</sup> *Houston Ry. Co. v. United States* (1914), 234 U. S. 342.

<sup>31</sup> Thompson, *op. cit.*, 375.

settling strikes affecting the production of goods, which though produced within a state are shipped through the channels of interstate commerce; <sup>32</sup> (5) the commerce power has also been extended to the control of morals, gambling, food, drugs, and health; <sup>33</sup> and (6) by means of this power Congress may exclude from the mails obscene literature and prize-fight films. The Supreme Court has said that "We are one people and the powers reserved to the states and those conferred on the nation are adapted to be exercised whether independently or concurrently to promote the general welfare, material and moral." <sup>34</sup>

The subjects in this list which are distinctly in the jurisdiction of the states but which have fallen largely under federal control are: (1) intrastate commerce, (2) labor, (3) morals, (4) health, and (5) gambling. In 1916 Congress attempted by exercise of the commerce power to control child labor by forbidding the interstate shipment of goods manufactured in plants employing children under fourteen years of age. <sup>35</sup> The Supreme Court held that Congress in this matter transcended its authority by attempting to control "a purely local matter." <sup>36</sup> The success of Congress in this attempt would practically have left the police power of the states to the tender mercies of its discretion.

The taxing power of Congress which, of course, was granted as the means for raising revenue, has been extensively used for regulatory purposes. Taxes levied primarily to effect certain social results and only incidentally to produce revenue have been sustained on the theory that the courts are not justified in inquiring into the purpose of a taxing act of Congress; they must accept such acts at face value. If they say on their face that they are revenue acts, then they must be so construed regardless of what other objects they accomplish. For regulatory purposes Congress has levied tonnage duties, and taxes on state bank notes, oleomargarine, matches, and narcotics. <sup>37</sup> Having failed to control child labor by means of the commerce power, Congress recently attempted by the Keating-Owen Act to accomplish the same purpose by means of taxation. The Supreme Court again intervened, saying: "Grant the validity of this law, and all that Congress would need to do

<sup>32</sup> *Loewe v. Lawler* (1908), 208 U. S. 274; *Gompers v. Buck Stove and Range Co.* (1911), 221 U. S. 418.

<sup>33</sup> *Champion v. Ames* (1903), 188 U. S. 321.

<sup>34</sup> *Hoke v. United States* (1913), 227 U. S. 308.

<sup>35</sup> 39 Stat. at L. 675.

<sup>36</sup> *Hammer v. Dagenhart* (1918), 247 U. S. 251.

<sup>37</sup> *United States v. Doremus* (1919), 249 U. S. 86.

hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the states have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word 'tax' would be to break down all constitutional limitations of the powers of Congress and completely wipe out the sovereignty of the States."<sup>38</sup> Similarly the federal Grain Futures Act attempting to control trading in futures by a tax of twenty cents per bushel on all purchases was declared unconstitutional by the Supreme Court as being an unjustifiable use of the taxing power to control domestic matters. Apparently the judicial doctrine governing the use of the taxing powers by Congress is that it may be employed (1) to raise revenue and (2) to sanction the exercise of a delegated power; and (3) to regulate businesses which cannot be pursued as a matter of constitutional right.<sup>39</sup>

The postal powers have been used to extend federal powers to local matters under color of protecting the United States mails. The President has intervened in labor disputes in Illinois, West Virginia, Michigan, and Colorado, ostensibly to remove obstructions to the passage of the mails and interstate commerce but actually to protect the peace of the United States.<sup>40</sup> Local authorities in each instance protested against such action as a violation of the police power of the states but public opinion sustained the President. The Supreme Court unanimously approved the intervention of President Cleveland in the Chicago strike in 1894.<sup>41</sup> In the construction of post roads at first directly and after 1916 indirectly through subsidies to the states, the authority of Congress has touched practically all parts of the nation. The Federal Highway Act of 1921 provides for the allotment of federal funds to the states on the basis of population, area, and mileage of rural free delivery routes on the condition that the states make an allotment equal to the amount received from Congress. Federal control of the expenditure of the combined road fund is accomplished by virtue of the fact that the approval of the Secretary of Agriculture of the routes, plans, and specifications of the proposed roads is required before federal funds may be used. The states in order to

<sup>38</sup> *Bailey v. Drexel Furniture Co.* (1922), 259 U. S. 20.

<sup>39</sup> Thompson, *op. cit.*, 68-69.

<sup>40</sup> H. L. West, "Federal Power and the People," 47 *Bookman*, 525-537.

<sup>41</sup> *In re Debs* (1895), 158 U. S. 564.



secure these funds readily submit to these conditions. Federal inspection continues after the construction of a road in order to see that it is being properly maintained by the state. It is important to note that, since the states are spending much more upon road construction and maintenance than they would spend without federal aid, state taxation has largely fallen under federal influence.<sup>42</sup>

The treaty-making power has also been a source upon which the expansion of federal authority has been based. The acquisition and disposal of real property by aliens in this country was at first forbidden by the common law and hence generally by the American states. But between 1787 and 1866, some forty-four treaties were made containing provisions which overthrew this doctrine by removing such incapacity.<sup>43</sup> The killing of migratory birds is now regulated by treaty, while an act of Congress attempting to effect the same purpose was declared unconstitutional. These treaties have been sustained by the Supreme Court in a series of cases.<sup>44</sup> "The United States," says Corwin, "has exactly the same range of power in making treaties that it would have if the states did not exist."<sup>45</sup> Presumably there could be such a thing as an unconstitutional treaty, yet the Supreme Court has never found one. If, as Professor Corwin contends, the treaty-making power is subject to only political limitations, it may become the chief means of invading the police powers of the states. However, political influences will likely maintain a fairly well-balanced federalism.

2. *Centralization Through Amendments.* The amendment process has been the means of a radical and at times almost violent expansion of national authority. The war amendments, Thirteenth, Fourteenth, and Fifteenth, accomplished a social and political revolution. The Thirteenth socialized four billion dollars worth of property. The Fourteenth abridged the powers of the states by (1) defining citizenship as primarily a national matter and (2) forbidding the states (a) to enact or enforce any law abridging the privileges or immunities of citizens of the United States, (b) to deprive any person of life, liberty, or property without due process of law, and (c) to deny any person within their

<sup>42</sup> Austin F. Macdonald, *Federal Aid* (1928), 85-122.

<sup>43</sup> R. Hayden, "The States Rights Doctrine and the Treaty Making Power," 22 *Am. Hist. Rev.*, 566-585.

<sup>44</sup> *Fairfax v. Hunter* (1813), 7 Cranch 603; *Chirac v. Chirac* (1817), 2 Wheaton 259; *Carneal v. Banks* (1825), 10 Wheaton 181. See also E. S. Corwin, *National Supremacy*, 300.

<sup>45</sup> "The Treaty Making Power," 199 *North Am. Rev.*, 898.

jurisdiction the equal protection of the laws.<sup>46</sup> The second restriction has subjected to review by the federal courts state legislation affecting adversely the personal or property rights of individuals. This limitation was at first construed by the Supreme Court to refer exclusively to the negro,<sup>47</sup> but later it was expanded to include all persons and corporations.<sup>48</sup> The due process clause is regarded as the most pervasive of all the constitutional restrictions upon the legislative powers of the states.<sup>49</sup> The Fifteenth Amendment prohibits a state from denying citizens the right to vote on account of race, color, or previous condition of servitude, and the Nineteenth has added "sex" to this list of restrictions.<sup>50</sup>

The Sixteenth Amendment, granting Congress the power to levy an income tax, has contributed to centralization (1) by making inroads upon a source of revenue which had been used by the states since colonial times and (2) by bringing the federal government into direct and intimate relation with individuals in the administration of the income tax law. The Eighteenth Amendment has brought the social life of the individual under the supervision of the national government. It has forced an expansion in the personnel of the administrative branch of the government and has multiplied the work of the federal courts. It has deprived the states of one of their chief police powers and overrun them with an army of federal agents. It has effected a wholesale and revolutionary shifting of the police powers of the states to the central government. The complete results of this change cannot yet be stated.

3. *Centralization Through Indirect Means.* Finally, the national authority has been increased by means of grants-in-aid to the states for various purposes. The constitutional basis of such extension of powers is very questionable and can be justified only by accepting the view that the federal government possesses broad inherent and resulting powers.<sup>51</sup> The immediate urge for these grants-in-aid was due to the existence of a large surplus in the national treasury. Even Thomas Jefferson when confronted with a surplus in 1806 could not resist the temptation to suggest that

<sup>46</sup> *The Constitution*, Art. XIV, Sec. 1.

<sup>47</sup> *The Slaughter House Cases* (1872), 16 Wallace 36; *Munn v. Illinois* (1877), 74 U. S. 113.

<sup>48</sup> *Chicago, Milwaukee and St. Paul Ry. Co. v. Minnesota* (1890), 134 U. S. 418.

<sup>49</sup> Corwin, *op. cit.*, 16.

<sup>50</sup> Charles W. Pierson, *Our Changing Constitution* (1922), 49-58.

<sup>51</sup> For a classical statement of the doctrine of inherent powers, see James DeWitt Andrews, *Works of James Wilson* (1896), I, 558.

it be applied to "the great purposes of public education, roads, rivers, canals, and such other objects of public improvement as may be thought proper."<sup>52</sup> But he thought that an amendment to the Constitution was necessary to accomplish this end.

The national government, while leaving the promotion and control of education to the states, has from early times encouraged its advancement. In 1785 Congress set aside public lands to be used for educational purposes. The Northwest Ordinance of 1787 stated, "Religion, morality and knowledge being necessary to good Government and the happiness of mankind, schools and the means of education shall forever be encouraged." One of Washington's most cherished desires was "to see a plan devised on a liberal scale which would have a tendency to spread systematic ideas through all parts of this rising Empire, thereby to do away with local attachments and state prejudices as far as the nature of things would, or indeed ought to admit, from our national councils."<sup>53</sup> Because of constitutional limitations, the federal government has been unable to enter the field of education directly, and has, therefore, been obliged to content itself with indirectly aiding the states, by gathering and disseminating information and by making grants-in-aid.

Prior to 1914 public education was regarded exclusively as a state function. At first the federal government made various grants to promote educational work directed by the states. In 1862 the Morrill Act<sup>54</sup> was passed to promote the establishment of agricultural and mechanical colleges. It has tended to make education more democratic and practical.<sup>55</sup> In 1887 the Hatch Act established in the existing agricultural colleges a number of agricultural experiment stations<sup>56</sup> which have considerably improved farming methods in the United States.<sup>57</sup> These two acts, however, left the management of educational institutions thus aided largely in the hands of the state. The Second Morrill Act, passed in 1890, provided for partial supervision by the Secretary of the Interior of the funds granted, but did not authorize interference by national officials with general matters of administration.<sup>58</sup> In 1914,

<sup>52</sup> Quoted by H. L. West, 47 *Bookman*, 525-537.

<sup>53</sup> *Writings* (Ford Ed., 1893), XIV, 277.

<sup>54</sup> 12 *Stat. at L.*, 503.

<sup>55</sup> Eugene Davenport, "Early Effects of Congressional Appropriations for Education," 19 *Univ. of Illinois Bulletin*, No. 17, 8.

<sup>56</sup> 21 *Stat. at L.*, 440.

<sup>57</sup> Davenport, *op. cit.*, 16.

<sup>58</sup> 26 *Stat. at L.*, 417.

however, this policy was changed by the passage of the Smith-Lever Act.<sup>59</sup> Previously the states had incurred practically no obligations by accepting federal aid; now they must fulfill certain requirements before receiving funds appropriated by Congress: first, they must raise from local sources a sum equal to the amount granted by the national government, and second, they must submit plans for the expenditure of the combined sum to federal agencies and receive their approval. By accepting these conditions a certain amount of supervision by federal authorities was extended to educational activities receiving federal aid.

This principle of indirect federal supervision of state activities by grants-in-aid was also embodied in the Smith-Hughes Act of 1917 designed to establish coöperation between the federal government and the states in promoting vocational education in secondary schools and in training teachers in vocational subjects.<sup>60</sup> This Act created a Federal Board for Vocational Education with powers to approve or reject the plans of the states for carrying its provisions into effect. Likewise the Industrial Rehabilitation Act of 1920 provided for such coöperation in, and ultimate national control of, the rehabilitation of persons disabled in industry.<sup>61</sup> The Maternity and Infant Hygiene Act of 1921<sup>62</sup> seeks to promote the welfare and hygiene of mothers and infants by means of a "fifty-fifty" arrangement with final control vested in the Children's Bureau of the Department of Labor and the special mixed Board of Maternity and Infant Hygiene. The states, of course, are not obliged to accept federal aid on these conditions but they have done so to a notable extent.

The national government is now bearing most of the expense in arming and equipping the National Guard and for this purpose appropriates some thirty millions annually, the largest sum paid the states for any form of federal aid except good roads. The National Guard subsidy is granted to the states on a more liberal basis than any other aid since they pay only about one-third of the total cost of maintaining the National Guard.

The General Staff of the Regular Army, its corps area commanders, and the Bureau of Militia of the War Department have supervision over the National Guard. When a new company is organized in a state, the governor appoints a colonel to take charge

<sup>59</sup> 38 *Stat. at L.*, 767.

<sup>60</sup> 39 *Stat. at L.*, 929.

<sup>61</sup> 41 *Stat. at L.*, 735.

<sup>62</sup> 42 *Stat. at L.*, 224.



of it. The company is then inspected by an army officer and if it is found to conform to federal requirements, it is given a formal letter of recognition by the Bureau of Militia, authorizing the issue of the necessary clothing, equipment, and arms and providing for the drawing of pay for drill and camp service by its members. Before its officers receive federal recognition, they must meet certain requirements as to age and training and must qualify before a board of officers appointed by the Secretary of War. The effects of federal supervision over the National Guard have been (1) to restrict governors in making political appointments for officers, (2) to increase the standards and efficiency of the National Guard, and (3) to cause the states to spend more money on this service. The state activities relating to this service, says Macdonald, are subject to "strict supervision."<sup>63</sup>

#### V. PROBLEMS ARISING FROM CENTRALIZATION

The movement toward centralization, only certain aspects of which have been examined, raises a number of complex questions which cannot be answered by the application of any set rules. One of the chief difficulties in dealing with this problem has been the reliance upon judicial theories and ideas of constitutional interpretation which were developed to fit the needs of a simple society but which are inapplicable to the conditions of modern life. Too much time has been spent in debating what the Constitution means in the light of precedent; too little in considering how our governmental institutions can be made to serve the pressing demands of current society. Before much can be done, *a priori* legal arguments must give way to an objective study of our economic and social needs. Mankind was not made for constitutions; but constitutions for mankind. This fact is clearly stated by Professor Corwin:

As a *document* the Constitution came from its framers, and its elaboration was an event of the greatest historical interest, but as a *law* the Constitution comes from and derives all its force from the people of the United States of this day and hour. In the words of the preamble, "We, the people of the United States, *do* ordain and establish this Constitution"—not *did* ordain and establish. The Constitution is thus always in contact with the source of its being—it is a living statute to be interpreted in the light of living conditions. Resistance it offers to the too easy triumph of social forces, but it is only the

<sup>63</sup> *Op. cit.*, 135.

resistance of its words when they have been fairly construed from a point of view which is sympathetic with the aspirations of the existing generation of American people, rather than that which is furnished by concern for theories as to what was intended by a generation long since dissolved into its native dust.<sup>64</sup>

We have noted in detail how, by the interplay of numerous forces, our frontier communities of the seventeenth and eighteenth centuries have been consolidated into a great integrated society necessitating a high degree of centralized administration and how our Constitution has been gradually, though imperfectly, adapted to the actualities of our national economy. It is well now to consider the fact that there are certain definite and compelling limitations to a sweeping nationalization of governmental activities, requiring a protection of the integrity of local institutions. To begin with, sectionalism in the United States is natural, being based on geographical divisions of climate, soil, and products, which give rise to different problems and to different attitudes of mind. These variations can best be recognized and considered by local representatives in close touch with conditions rather than by those at the national capital, who often lack both interest and aptitude to give purely local problems their attention. Again, if the process of centralization is carried too far it will remove government away from the citizen, from whom it must proceed and upon whom it must operate. When this intimate relationship with the individual citizen is lost, interest in public affairs declines; the spirit of democracy decays.<sup>65</sup> Further, standardization of national life, often a result of centralization of governmental activities, especially in the field of education, is not to be desired. As Woodrow Wilson once said, "Communities must develop vitally by internal and not external forces. . . . It is this spontaneity and variety, this independent and irrepressible life of communities that has given our system its extraordinary elasticity and preserved it from the paralysis which has sooner or later fallen upon every people who have looked to their central government to patronize and nurture them."<sup>66</sup> Too great centralization in the end destroys itself by crushing the life of the nation on which it depends. Harmony in diversity and union without unity is the key to national growth and vitality.

<sup>64</sup> "Constitution v. Constitutional Theory," 19 *Am. Pol. Sci. Rev.*, 302.

<sup>65</sup> Harold J. Laski, "Sovereignty and Centralization," 9 *New Republic*, 176-178.

<sup>66</sup> 187 *North Am. Rev.*, 691.

There is another important consideration which must be borne in mind—the danger of overloading the national government with detailed work to be performed. Both England and France, highly centralized as they are, have been brought face to face with this aspect of the problem and are seeking a way out by the gateways of devolution and regionalism. Professor Barthelemy has said that the problem of liberty in France is regionalism, resuscitating the communes, and strengthening local life and patriotism. Sir Edward Gray has declared that the parliamentary system of England is breaking down under the strain of overwork and that a choice must be made between devolution and destruction. Charles E. Hughes has discerned a similar dangerous tendency in the United States with the rapidly increasing burdens of government shifted to Congress and the administrative bureaus.<sup>67</sup> The result is not confined to overloading the national government; it has more portentous implications. Today there are more than a half million persons in our federal civil service, made necessary by the astonishing expansion of national activities. Bureaus are established and in a few years emerge into departments employing thousands of men and women in almost every conceivable kind of activity, scattered throughout the country, spending millions of dollars—not amenable to, but largely independent of, local laws.<sup>68</sup> While contemplating the present situation, several writers have recalled the complaint against George III in the Declaration of Independence and applied it against the federal government: "He has erected a multitude of new offices, and sent hither swarms of officers, to harass our people and eat out their substance."

It is evident that there must be a proper balance between particularism and centralization, for the one may lead to political disintegration, while the other may produce tyranny and social paralysis. The necessary allocation of powers between the states and the nation was set forth by James Wilson, as follows: "Whatever object of government is confined in its operation and effect within the bounds of a particular state, should be considered as belonging to the government of that state; whatever object of government extends in its operation or effects beyond the bounds of a particular state, should be considered as belonging to the government of the United States."<sup>69</sup> Albert J. Beveridge proposed the following rule:

<sup>67</sup> S. Gale Lowrie, "Centralization v. Decentralization," 16 *Am. Pol. Sci. Rev.*, 379-386.

<sup>68</sup> West, 47 *Bookman*, 552-557.

<sup>69</sup> Andrews, *op. cit.*, I, 533.

"When an evil or a benefit is so widespread that it affects so much of the country as to be called national, the nation's power should be equal to end that evil or secure that benefit to the American people."<sup>70</sup> A reasonably safe conclusion may be drawn by applying the following tests suggested by John Ely Briggs:

Is local autonomy vital to equitable regulation?

Is the matter commonly beyond effective control?

Would uniformity of state laws be sufficient?

Is the matter so definitely regional as to be handled by treaty regulations among the states concerned?

Is public opinion crystallized in favor of national action? When answers to these queries clearly point to the desirability of national jurisdiction, let states rights be modified to meet the needs of the times.<sup>71</sup>

While speculation is dangerous, in conclusion certain suggestions may be made with respect to the future relation of the states to the national government: (1) since the states are recognized as self-governing unities by the federal Constitution, they will continue to perform numerous important functions independent of central control; (2) the division of powers between the states and the nation should be kept in harmony with the changing economic and social order. The formal federalism should be a duplicate of the federalism found in the actual structure of society; (3) their powers should be transferred to the central government when they fail to exercise them to meet the imperative needs of a rapidly unifying society; (4) a division of labor between the two wings of our federalism should be determined by the demonstrated fitness of each to serve in its respective capacity the best interests of our entire citizenship. As Professor A. N. Holcombe says:

While superior financial resources of the federal government make its assistance indispensable, the superior adaptability of the State governments to local conditions is likely more and more to lead the federal government to work through the agency of the States, securing the necessary degree of federal control through the power of the purse. Our dual government will respond to the changing conditions. It will tend to approximate a federal system of the German or Swiss type, in which the States will be able to justify their continued existence as administrative agents of the national government. . . . The federated states will not give way before a single consolidated and

<sup>70</sup> Quoted in 35 *Am. Rev. of Revs.*, 483.

<sup>71</sup> 10 *Iowa Law Bulletin*, 312.



highly centralized State, as many statesmen and political scientists have apprehended. They will continue to play a large, even an increasing part in the administration of public affairs, but as instruments of national purposes rather than as independent political entities. . . . The place of the State in the government of the nation seems to be secure.<sup>72</sup>

<sup>72</sup> "The States as Agents of the Nation," 1 *Southwestern Pol. Sci. Quar.*, 325-326.

## CHAPTER XXVIII

### NATIONAL JUDICIARY: ESTABLISHMENT, ORGANIZATION, AND JURISDICTION

#### I. THE NECESSITY FOR A NATIONAL JUDICIARY

Hamilton regarded the want of a judiciary as the crowning defect of the Confederation.<sup>1</sup> There seems to have been almost unanimity of opinion among the leaders of the Convention of 1787 on the importance of a judiciary of some kind for the national government, since each of the four proposals for the Constitution recommended the establishment of a national judiciary.<sup>2</sup> The Convention very early in its proceedings pledged itself to the realization of this recommendation.<sup>3</sup> However, it was not a unit on whether the nation should have a complete judiciary consisting of a supreme court and inferior courts or just a supreme court with the state courts used as subordinate national courts. Rutledge of South Carolina contended "that the State Tribunals might and ought to be left in cases to decide in the first instance, the right of appeal to the supreme national tribunal being sufficient to secure the national rights and uniformity of judgments; that it was making an unnecessary encroachment on the jurisdiction of the States and creating unnecessary obstacles to their adoption of the new system."<sup>4</sup> Madison replied "that unless inferior tribunals were dispersed throughout the Republic with *final* jurisdiction in *many* cases, appeals would be multiplied to a most oppressive degree; that besides, an appeal would not in many cases be a remedy. What was to be done after improper verdicts in State tribunals obtained under the biased directions of a dependent Judge, or the local prejudices of an undirected jury? To remand the cause for a new trial would answer no purpose. To order a new trial at the Supreme bar would oblige the parties to bring up their

<sup>1</sup> *The Federalist*, No. 22 (Lodge Ed., 132).

<sup>2</sup> Hunt and Scott, *Debates in the Federal Convention of 1787*, 25, 119.

<sup>3</sup> *Ibid.*, 56.

<sup>4</sup> *Ibid.*, 60.

witnesses, tho' ever so distant from the seat of the Court. An effective Judiciary establishment commensurate to the legislative was essential. A Government without a proper Executive and Judiciary would be the mere trunk of a body, without arms or legs to act or move."<sup>5</sup> The Convention finally by a compromise decided to create only a Supreme Court and leave the establishment of inferior courts optional with Congress.<sup>6</sup>

The Supreme Court is the creation of the Constitution, and, therefore, cannot be abolished by Congress. "The existence of this court," said Chief Justice Taney, "is, therefore, as essential to the organization of the government established by the Constitution as the election of a president or members of Congress."<sup>7</sup> This contribution of the Convention alone constitutes a durable monument to the statesmanship of its members. The importance of the Supreme Court to our system of government may in part be explained on the following basis: (1) a system of government, partly national and partly federal, with two governments operating independently of each other in the same territory and upon the same individuals, required a tribunal that could decide conflicts arising between the two over the exercise of their respective powers, (2) uniformity of interpretation of the Constitution, Laws, and Treaties called for a court of an authoritative jurisdiction national in scope, (3) the settlement of disputes between citizens of different states, between states and citizens of different states, and between different states necessitate a court of high order free and independent of local influence, (4) a supreme national court was necessary to handle cases involving international and admiralty law, (5) the limitation of federal power to its legitimate scope, something quite apart from the settlement of conflicts between national and state authorities, required a national supreme court independent of congressional control, and (6) the Constitution being a mere skeleton or a framework of a system of government made necessary a court with powers to supply the details and give the flexibility needed for the practical workings of the government.<sup>8</sup>

The agreement in the Convention to leave the creation of the inferior national courts to the discretion of Congress has proved

<sup>5</sup> *Ibid.*, 60-61.

<sup>6</sup> *The Constitution*, Art. III, Sec. 1: "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may, from time to time, ordain and establish."

<sup>7</sup> *Gordon v. United States* (1865), 117 U. S. 697.

<sup>8</sup> W. W. Willoughby, *The Supreme Court of the United States* (1890), 7-9.

to be a wise solution of this problem because it has made possible a flexibility and adaptability in these courts which experience has shown necessary and which constitutional fixity would have prevented. These courts have not only been frequently changed in both organization and jurisdiction but also modified in their relations to both the supreme court and the state courts.

## II. THE JUDICIAL POWER OF THE UNITED STATES

1. *Its Scope.* The Constitution in its grant of judicial power extends it to (1) cases (a) arising under the Constitution, laws, and treaties of the United States, (b) affecting ambassadors, other public ministers, and consuls, (c) involving admiralty and maritime jurisdiction, and (2) controversies (a) to which the United States is a party, (b) between two or more states, (c) between a state and citizens of another state,<sup>8a</sup> (d) between citizens of different states, (e) between citizens of the same state claiming lands under grants of different states, (f) between a state, or the citizens thereof, and foreign states, citizens, or subjects.<sup>9</sup>

2. *Its Limitations.* In the first place, the jurisdiction of the courts of the United States is limited to cases or controversies<sup>10</sup> of a judicial character. The judiciary cannot encroach upon the powers of the legislative or executive branches of the government. The presumption exists that a court can exercise only judicial functions. This has led to an attempt on the part of the courts to distinguish between judicial and political questions. This is an exceedingly difficult line to draw and no generalization on the subject is possible. Some illustrations, however, will show the nature of this limitation. The Supreme Court has held that the following matters are political in character and are subject to the decision of only the Executive: (1) the recognition or non-recognition of diplomatic representatives of foreign powers,<sup>11</sup> (2) jurisdictional disputes between foreign governments over territory,<sup>12</sup> (3) the existence or non-existence of a state of war

<sup>8a</sup> The United States courts were deprived of this item of their jurisdiction by the eleventh amendment to the Constitution.

<sup>9</sup> Art. 3, Sec. 2.

<sup>10</sup> A case in the eyes of the law is an action or a suit brought before a court of competent jurisdiction to decide the respective rights of the litigants with reference to the matter in dispute. A controversy has been held to include only suits of a civil nature, though in general it is used as a synonym of case.

<sup>11</sup> *Ex parte Baiz* (1890), 135 U. S. 403.

<sup>12</sup> *Foster v. Neilson* (1829), 2 Peters 253.



between the United States and a foreign power,<sup>13</sup> and (4) the expiration or revocation of treaties to which the United States is a party. Whether a republican form of government exists in a state is a political question and its determination rests primarily with Congress.<sup>14</sup> In the second place, the jurisdiction of the national courts is restricted to the constitutional grant. Congress cannot add to this jurisdiction. It can divide the judicial powers of the United States among the various national courts or between them and the state courts, or withhold jurisdiction from them. No court of the United States except the Supreme Court, whose original jurisdiction is stated in the Constitution, can claim any jurisdiction which has not been granted by Congress.<sup>15</sup> "The Constitution," said Justice Southerland, "simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it."<sup>16</sup> In fact, Congress has not yet vested the whole of the judicial power of the United States in the national courts. In the third place, the Supreme Court has repeatedly held that purely administrative proceedings are not subject to judicial review.<sup>17</sup> Finally, the national courts will not assume jurisdiction of suits arising under state statutes providing for declaratory judgments since such judgments are not decisions of cases or controversies involving the rights of adverse litigants but are merely judicial interpretation of hypothetical cases, in which no controversy over the adverse rights of actual litigants is involved.<sup>18</sup> The Supreme Court in a recent decision said that it has "no jurisdiction to review a mere declaratory judgment."<sup>19</sup> The question of jurisdiction is always before the courts regardless of the will of the litigants and must be answered by them alone.

3. *Its Basis.* The jurisdiction of the courts of the United States is based on (1) the character of the cause or (2) the character of the parties or (3) both in a few cases. "Jurisdiction," said Chief Justice Marshall, "is given to the courts of the Union in two

<sup>13</sup> *Prize Cases* (1862), 2 Black 635.

<sup>14</sup> *Luther v. Borden* (1849), 7 Howard 1; *Pacific States Telephone and Telegraph Co. v. Oregon* (1912), 233 U. S. 118; *Fairchild v. Hughes* (1922), 258 U. S. 126; *Massachusetts v. Mellon* (1923), 262 U. S. 447.

<sup>15</sup> John C. Rose, *Jurisdiction and Procedure of the Federal Courts* (3rd Ed., 1926), 27.

<sup>16</sup> *Kline v. Burke Construction Co.* (1922), 260 U. S. 226.

<sup>17</sup> *Upshur County v. Rich* (1890), 135 U. S. 467; *Pacific Steam Whaling Co. v. U. S.* (1903), 187 U. S. 447; *Pacific Live Stock Co. v. Lewis* (1916), 241 U. S. 440.

<sup>18</sup> Armistead M. Dobie, *Federal Jurisdiction and Procedure* (1928).

<sup>19</sup> *Liberty Warehouse Co. v. Grammis* (1927), 273 U. S. 70.

classes of cases. In the *first*, their jurisdiction depends on *the character of the cause*, whoever may be the parties. . . . In the *second class*, the jurisdiction depends entirely on the character of the parties.”<sup>20</sup> In the first class would fall (1) all cases arising under the Constitution, laws, and treaties of the United States and (2) those involving admiralty and maritime jurisdiction. In these two groups the nature of the case and not the character of the litigants is controlling. In the second class belong all the other cases or controversies mentioned in the second section of Article three of the Constitution<sup>21</sup> except those between citizens of the same state claiming lands under grants of different states. In the excepted group, jurisdiction is based partly on the character of the parties (they must be citizens of the same state) and partly on the nature of the case (it must involve claims to lands under the grants of different states). Both of these requisites must concur to give jurisdiction.

The jurisdiction of a court is its right to hear and decide judicial causes or cases. A case is a question contested before a court of justice and may be an action or a suit at either law or equity. The right of a court to adjudicate the subject matter in a given case depends on three essentials: “First, the court must have cognizance of the class of cases to which the one to be adjudicated belongs; second, the proper parties must be present; third, the point decided upon must be, in substance and effect, within the issue.”<sup>22</sup> Jurisdiction of a court may be original or appellate, exclusive or concurrent, criminal or civil, general or limited. A court exercises original jurisdiction when it tries cases in the first instance and appellate jurisdiction by hearing appeals in cases tried in the first instance by a lower court. The same court may exercise original jurisdiction in some matters and appellate jurisdiction in others. Exclusive jurisdiction gives to a single court the sole authority to try a particular type or class of cases. Concurrent jurisdiction gives two or more courts the same authority over certain parties or subject matter. Criminal jurisdiction is for the punishment of crimes in contrast to all other matters which are civil. General or limited jurisdiction refers to its extensive or restricted character.

<sup>20</sup> *Cohens v. Virginia* (1821), 6 Wheaton 264, 378.

<sup>21</sup> Cases or controversies, (1) affecting ambassadors, other public ministers, and consuls, (2) to which the United States is a party, (3) between two or more states, (4) between a state and citizens of another state, (5) between citizens of different states, and (6) between a state, or the citizens thereof, and foreign states, citizens, or subjects.

<sup>22</sup> *Reynolds v. Stockton* (1891), 140 U. S. 254, 268.

A court exercises final jurisdiction when there is no appeal from its decision. It is necessary for courts to exercise final jurisdiction in order to prevent the repeated appeal of cases and the consequent cost of litigation. Final jurisdiction may be determined by the amount involved in a civil case or by the seriousness of its character if it is of a criminal nature.

It is obvious that jurisdiction is a determining factor in organizing a system of courts. By their jurisdiction, they may be made practically independent of one another, or unified into a system. The importance of an individual court may be determined by the scope or nature of its jurisdiction. The jurisdictions of courts determine their relations not only to one another but also to the people. For instance, if a lower court has a large exclusive jurisdiction, it becomes a great judicial forum for a large amount of litigation, and, since it is a lower court, it will likely be located close to the people. This means a great convenience to litigants and witnesses as well as economy in justice. The inconvenience and expensiveness of justice may amount to its denial.

4. *The Nature of the Jurisdiction of National Courts.* The courts of the United States exercise both exclusive and concurrent jurisdiction. This matter is determined by Congress and is regulated by the Judicial Code of the United States. At the present time (1929) their exclusive jurisdiction extends to: (1) crimes and offenses cognizable under the authority of the United States, (2) suits for penalties and forfeitures incurred under the laws of the United States, (3) civil causes of admiralty and maritime jurisdiction, with the rights of common-law remedy preserved to suitors in all cases in which it is competent to give it, (4) all seizures under laws of the United States on land or waters not in admiralty and maritime jurisdiction, (5) all prizes brought into the United States, (6) all proceedings for the condemnation of property taken as prize, (7) all cases arising under patent-right or copyright laws of the United States, (8) all matters and proceedings in bankruptcy, (9) all civil controversies to which a state is a party, except between a state and its citizens, or those of other states, or aliens, and (10) suits against ambassadors or other public ministers, or their domestics, or domestice servants, or against consuls or vice-consuls.<sup>23</sup> Of course, suits against the United States can only be maintained in its own courts after obtaining its consent.

In all other cases in the grant of judicial power made by the

<sup>23</sup> 28 U. S. C. A., Sec. 371.

Constitution not listed in this exclusive jurisdiction, the courts of the Union and those of the states have concurrent jurisdiction. These cases fall into two important classes: (1) those arising under the Constitution, laws except those mentioned above, and treaties of the United States, and (2) those between citizens of different states. All cases included in these two great classes of cases may be brought, assuming the requisite jurisdictional facts, in either the United States courts or the state courts, or may be brought in state courts and removed to the national courts after the requirements of the removal statutes of the United States have been satisfied.

### III. ESTABLISHMENT, ORGANIZATION, AND JURISDICTION OF THE NATIONAL COURTS

#### 1. *Establishment*

It has already been noted that the Constitution made it mandatory for Congress to establish a Supreme Court of the United States but left the creation of inferior national courts to its discretion. Whether there should be a really national judiciary, consisting of a supreme and inferior courts, or just a supreme court, with the right to review the decisions of state courts involving the Constitution, laws, or treaties of the United States, remained for Congress to determine. Obviously the accomplishment of this task amounted to the completion of the unfinished work of the Convention of 1787 and in effect to a very real contribution to the Constitution itself. Congress made a solution of this problem by the famous Judiciary Act of 1789 which established a national judiciary consisting of District Courts, Circuit Courts, and a Supreme Court. By this act, the country was divided into thirteen judicial districts, coterminous with state lines, except that Massachusetts and Virginia were cut into two districts each.<sup>24</sup> In each of these districts was established a district court with a single justice to preside over it. These thirteen districts were grouped into three circuits in each of which was established a circuit court, consisting of two Supreme Court Justices and one of the district judges of the circuit, and sitting twice a year in the various districts of the circuit. This system of inferior courts was headed by a Supreme Court consisting of a Chief Justice and five associate justices.<sup>25</sup>

<sup>24</sup> North Carolina and Rhode Island were not yet members of the Union.

<sup>25</sup> Felix Frankfurter and James M. Landis, *The Business of the Supreme Court* (1927), 11-12.



The necessity of making access to the national courts as convenient and inexpensive as possible and the importance of providing a ready means for enforcing the claims and protecting the agents, of the national government against the obstruction of local authorities justified the Convention in making provision for inferior national courts in the Constitution and the Congress in establishing them. The Act of 1789 is generally regarded as one of the most constructive measures that Congress has ever passed.<sup>26</sup>

This act together with its modifications and expansions constitutes the present basis of the national judiciary, which may now be said to consist of two groups of courts: (1) those of general jurisdiction including (a) the District Courts, (b) the Circuit Courts of Appeals established in 1891, and (c) the Supreme Court, and (2) those of special jurisdiction including (a) the Court of Claims (1855), (b) the Court of Customs Appeals (1909), (c) the Board of Tax Appeals (1924), and (d) the Customs Court (1926). There are also the courts of the District of Columbia and Territorial Courts. The Circuit Courts were abolished in 1911.

## 2. *Their Organization and Jurisdiction*

A. *The District Courts.* (1) Organization. The geographical distribution of the inferior national courts is a purely arbitrary matter for the determination of Congress. The unit, however, is the district of which there are now in the states eighty-one: twenty-four states with one, fifteen with two, seven with three, and two with four.<sup>27</sup> Density of population, the amount of litigation, and the size of a state govern the number of its districts as well as the number of judges for each district. No district cuts across state lines and when a state is divided into two or more districts, they are given such titles as northern and southern, or eastern and western, or eastern, middle, and western, and the counties composing them are enumerated.<sup>28</sup> Some of these districts comprise more than fifty counties.

The result of such large districts has been considerable inconvenience and expense to litigants and witnesses even though the

<sup>26</sup> Charles Warren, "New Light on the History of the Federal Judiciary Act of 1787," 37 *Harv. L. Rev.*, 49.

<sup>27</sup> *Official Register of the United States* (1927), 134-144. Ala., Ga., Ill., N. C., Okla., Penn., and Tenn., are divided into three districts and New York and Texas into four.

<sup>28</sup> 28 *U. S. C. A.*, Secs. 141-196.

district courts sit at various places in their districts. Congress has largely remedied this matter by dividing about two-thirds of the districts into divisions. Some districts contain as many as eight divisions and in all there are now about one hundred and fifty divisions.<sup>29</sup>

There is at least one district judge in each district, but the rapid development of industrial centers with the attendant increase in litigation has made it necessary to increase the number of judges in some districts varying from two in such districts to six in the southern district of New York which includes New York City. There are now (1929) one hundred and twenty-five district judges in active service in the states, each of whom receives a salary of \$10,000 a year. The United States District Court is held by a single judge except in a few cases of exceptional importance.<sup>30</sup>

(2) Terms and Places of Sitting. Usually the District Court sits at several places in the district and holds each year two terms of court at each place. This matter is determined by law at great length and with meticulous particularity because the terms of court are regarded with almost sacrosanct reverence. For example, the Judicial Code requires the United States District Court for the Western District of Virginia to hold each year two terms at each of seven widely-scattered cities.<sup>31</sup> At each of these cities a resident clerk of the court maintains an office open at all times for the transaction of certain types of its business as a means of expediting its work during its sessions. As a rule the courts of the United States have liberally interpreted the technicalities with reference to the terms of court, emphasizing substance rather than form.

(3) Jurisdiction. The District Courts of the United States are courts of both law and equity and exercise primarily original jurisdiction which is either exclusive or concurrent, and civil or criminal. They have exclusive jurisdiction of all crimes against the United States. Crimes against the United States are purely statutory. Unless an act violates the penal code of the United States, it makes no difference how vicious in its nature or offensive in its character it may be, it is not an offense against the United States.

<sup>29</sup> Dobie, *op. cit.*, 6.

<sup>30</sup> In these cases Congress has provided that there shall be three judges, one of whom must be either a circuit or Supreme Court Justice. These cases involve (a) the anti-trust or interstate commerce laws, (b) restraining the enforcement of state statutes or administrative orders, and (c) restraining the enforcement of, or setting aside, orders of the Interstate Commerce Commission.

<sup>31</sup> 28 U. S. C. A., Sec. 192.

In other words, there are no common law crimes against the United States. The great majority of crimes committed within the territorial limits of the United States are offenses against the peace and dignity of the individual states and include such ordinary, entirely too ordinary, matters as murder, robbery, arson, and riots. Prosecutions for these crimes are instituted in the name of the state in its own courts. The criminal jurisdiction of the state courts, therefore, is general, while that of the District Courts of the United States is limited. Of course, the same act may be a crime against both the United States and a state and punishment for it inflicted by both. A man might deliberately derail a mail train, thereby killing the engineer. He is criminally responsible to the United States for obstructing its mail and to the state for murder. The crimes against the United States fall into three great classes: (a) those committed beyond the jurisdiction of any state on the high seas, or waters within the admiralty jurisdiction of the United States, or land under its exclusive control such as the District of Columbia, a government reservation, or places purchased in the states for post-offices, forts, dock-yards, or other governmental purposes; (b) those interfering with such activities of the government as laying and collecting taxes, establishing post offices and post roads, carrying the mails, or coining money or punishing for counterfeiting, and (c) those interfering with the control by the government of matters intrusted to it by the Constitution such as the regulation of interstate and foreign commerce, the broad scope of which is illustrated by the Mann Act of 1910, dealing with the white-slave traffic.

The District Courts are the only courts of the United States exercising a broad original civil jurisdiction. Their civil jurisdiction includes (a) all suits at law or equity, regardless of the amount of money involved, "brought by the United States, or by any officer thereof, authorized by law to sue", (b) civil causes in admiralty and maritime jurisdiction, (c) cases involving the internal revenue, anti-trust, interstate commerce, customs, postal, patent, and copyright laws, (d) bankruptcy proceedings, (e) Consuls and Vice-Consuls, (f) claims against the United States not exceeding ten thousand dollars, and (g) cases involving a federal question or diverse citizenship, if the amount of money involved is more than three thousand dollars, exclusive of interest and costs. A federal question is a matter the judicial settlement of which requires an interpretation of the Constitution, laws, or treaties of the United States and cases of diverse citizenship include

two classes of disputes: (1) those between citizens of different states and (2) those between citizens of a state and foreign states, citizens, or subjects. The jurisdiction of the District Courts is concurrent in (e) with the Supreme Court of the United States, in (f) with the Court of Claims, and in (g) with the state courts. The choice of court in these cases is a matter of convenience of the litigants.

The District Courts have general equity jurisdiction of all cases falling within the jurisdiction of the national courts, in which no adequate remedy exists at law. They also exercise a "removal jurisdiction." Congress has provided for the removal of cases brought first in state courts to the District Courts. This is neither original nor appellate jurisdiction. The District Courts also exercise a limited appellate jurisdiction from (a) the judgments and orders of United States Commissioners in cases arising under the Chinese Exclusion Laws and (b) the findings of referees as to the rights of way in Indian lands.

B. *The Circuit Courts of Appeals.* (1) Organization. The Circuit Courts of Appeals were created by Congress to relieve the Supreme Court of the tremendous amount of litigation that was increasingly crowding its docket. There are ten of these courts, one for each of the ten circuits into which the various states are grouped.<sup>32</sup> There are at least three circuit judges in each circuit,<sup>33</sup> and the Circuit Court normally consists of three Circuit Judges of the circuit in question, though two judges constitute a quorum. In the event the judges are divided, the case under consideration may be certified to the Supreme Court for instructions or for final decision. Not infrequently one or two District Judges are designated to sit in the Circuit Court. However, a District Judge who has tried a case in his own court is ineligible to sit in a Circuit Court hearing an appeal on the same case. The Supreme Court Justices, though eligible, do not as a matter of practice sit in the Circuit Court because of the pressure of their own work.

(2) Terms and Places of Sitting. The Judicial Code requires the Circuit Courts to hold annual terms in certain designated cities

<sup>32</sup> These circuits in the order numbered include the following states: (1) N. H., Me., Mass., R. I., Porto Rico, (2) Conn., N. Y., Vt., (3) Pa., Del., N. J., (4) Md., Va., W. Va., N. C., S. C., (5) Ala., Fla., Ga., La., Miss., Texas, (6) Ky., Mich., Ohio, Tenn., (7) Ill., Ind., Wis., (8) Ark., Iowa, Minn., Mo., Neb., N. D., S. D., (9) Ariz., Cal., Hawaii, Idaho, Mont., Nev., Ore, Wash., (10) Col., Kan., Okla., N. M., Utah, Wyo.

<sup>33</sup> The sixth, seventh, and tenth have four each, the second and eighth five each, and the others three each. Each circuit judge receives a salary of \$12,500 a year.



at times prescribed by the courts, though in some instances the time of the terms is fixed by the code.<sup>34</sup> The places of sitting in the various circuits are as follows: (1) Boston, (2) New York, (3) Philadelphia, (4) Richmond and Asheville, (5) Atlanta, Montgomery, Fort Worth, and New Orleans, (6) Cincinnati, (7) Chicago, (8) St. Louis, Kansas City, Omaha, and St. Paul, (9) San Francisco, Seattle, and Portland, (10) Denver, Oklahoma City, and Wichita.

(3) Jurisdiction. The Circuit Courts of Appeals, as their name implies, exercise exclusively appellate jurisdiction. The Act of 1891 creating them intended them to be a great buffer between the District Courts and the Supreme Court; that is, that they would stop sufficient litigation that heretofore had gone direct from the District Courts to the Supreme Court to afford relief to the latter which was at this time about three years behind in its work. This expectation was only partially realized for the reason that the growth in population and business of the country greatly multiplied litigation. To accomplish the original purpose in establishing these courts, Congress by the Act of February 13, 1925, greatly enlarged their jurisdiction by increasing the number of cases that could be appealed to them from the District Courts.

The Circuit Courts of Appeals, with specified qualifications and exceptions, now exercise appellate jurisdictions over the final decisions<sup>35</sup> of (a) the District Courts sitting in the states in their respective circuits, (b) the District Courts of Hawaii, Porto Rico, Alaska, the Virgin Islands, the Canal Zone, the United States Court for China, (c) the Supreme Courts of Hawaii and Porto Rico, and in designated instances, (d) the Federal Trade Commission, (e) the Federal Reserve Board, (f) the Interstate Commerce Commission, and (g) the Board of Tax Appeal.<sup>36</sup> The jurisdiction of Circuit Courts of Appeals is restricted to their respective circuits. For this reason, the courts not sitting in the states are attached to certain circuits for jurisdictional purposes.<sup>37</sup> By this means their jurisdiction is extended to our territorial possessions.

The appellate jurisdiction of the Circuit Courts of Appeals is employed by two processes, (a) writ of error and (b) appeal. A

<sup>34</sup> 28 U. S. C. A., Sec. 223.

<sup>35</sup> A final decision in this connection is one which completely determines the rights of the litigants so that, if it is affirmed by the appellate court, no further action is required except its execution by the lower court.

<sup>36</sup> Dobie, *op. cit.*, 784.

<sup>37</sup> Porto Rico is assigned to the first circuit; Virgin Islands to the third; Canal Zone to the fifth; and Alaska, Hawaii, and China to the ninth.

writ of error is the proper method of bringing to the attention of an appellate court mistakes made by a lower court in hearing and deciding cases at law while an appeal is made to secure a modification or a reversal of an erroneous decision in a suit at equity or admiralty. Broadly speaking, the Circuit Courts of Appeals exercise appellate jurisdiction in (a) all cases in which diversity of citizenship is the sole basis of the jurisdiction of the District Courts, (b) all criminal cases except a few in which a writ of error is granted the United States, (c) cases to which the United States is a party, (d) *habeas corpus* cases, (e) the great majority of cases involving a federal question, (f) admiralty cases, and (g) cases in bankruptcy.

C. *The Supreme Court.* (1) Organization. While the Constitution provides for "one supreme court," its organization was left to Congress. The Judiciary Act of 1789 made provision for a Supreme Court consisting of a Chief Justice and five Associate Justices. The number of Associate Justices was increased to six in 1807, to eight in 1837, and to nine in 1863.<sup>38</sup> An Act of 1866 provided for reducing the Associate Justices to seven by denying the President the power to fill vacancies, but in 1869 the Court was reconstituted with a Chief Justice and eight Associate Justices. Since the establishment of the Court there have been ten Chief Justices and sixty-five Associate Justices.<sup>39</sup> A system of nine circuits with a Court of nine members survived the transformation of the country into a continent and the increase of its population from seventeen millions in 1840 to a hundred and ten millions in 1920. A quorum of the Court consists of six members, though a smaller number may "make all necessary orders touching any suit, proceeding or process, depending in or returned to the Court."<sup>40</sup> A majority of the full Court must concur in all decisions. When the Court is so divided that a majority cannot agree, it is customary to order a rehearing of the case under consideration with a view of composing the differences of opinion. The Chief Justice presides if he is present; otherwise the senior Associate Justice performs the duties of the Chief Justice. Seniority

<sup>38</sup> Charles Evans Hughes, *The Supreme Court of the United States* (1928), 42.

<sup>39</sup> Three Presidents since Washington have appointed a controlling number of the members of the Court; Jackson, one Chief Justice and four Associate Justices, all Democrats; Lincoln, one Chief Justice and four Associate Justices, two Republicans, two Independents, one Democrat; Taft, one Chief Justice and five Associate Justices, three Republicans and three Democrats.

<sup>40</sup> 28 U. S. C. A., Sec. 340.

of Associate Justices is determined not by age but by the dates of their commissions. The salary of the Chief Justice is \$20,500 a year and that of the Associate Justices is \$20,000.

(2) Terms of the Court. The Judicial Code requires that one term be held annually at the seat of the government, commencing the first Monday in October, and such special terms as the business of the Court may require. As a matter of fact the Court sits almost continuously until late spring. During adjournments the Justices study the records and briefs of cases that have been argued before the Court, and write opinions.

By order of the court, the Chief Justice and the Associate Justices are allotted to the various circuits. Each Justice is known in his circuit as the Circuit Justice.<sup>41</sup> Circuit Justices in former days gave considerable time to their circuits, but this duty has always been an unwarranted draft upon their time and energy regardless of how desirable such relation might be. The pressing character of the work of the Supreme Court makes it practically impossible for the Supreme Court Justices to leave Washington for circuit riding.

(3) Jurisdiction. The Supreme Court exercises both original and appellate jurisdiction. Its original jurisdiction is fixed by the Constitution and extends to "cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party."<sup>42</sup> This jurisdiction is not exclusive and, while it is very important, it includes comparatively few cases. Its appellate jurisdiction is far more important and makes it in many respects the most powerful court in the world. It is by means of its appellate jurisdiction that it declares the statutes of both Congress and the state legislatures unconstitutional.

The appellate jurisdiction is regulated by Congress and has been changed from time to time with a view of reducing the burden of the Court so that it would have ample time to give its attention

<sup>41</sup> It should be noted that the Supreme Court Justices are in their relations to the circuits designated as *Circuit Justices* while the regular members of the Circuit Courts of Appeals are known as *Circuit Judges*. The present assignment of the Supreme Court Justices is as follows: For the First Circuit, Oliver Wendell Holmes, Associate Justice, for the Second Circuit, Harlan Fisk Stone, Associate Justice, for the Third Circuit, Louis Dembitz Brandeis, Associate Justice, for the Fourth Circuit, William H. Taft, Chief Justice, Edward T. Sanford, Associate Justice, for the Sixth Circuit, James C. McReynolds, Associate Justice, for the Seventh Circuit, Willis Van Devanter, Associate Justice, for the Eighth Circuit, Pierce Butler, Associate Justice, for the Ninth Circuit, George Sutherland, Associate Justice, for the Tenth Circuit, Willis Van Devanter, Associate Justice.

<sup>42</sup> *The Constitution*, Art. III, Sec. 2.

to only cases of national importance with that finesse of discrimination that legal distinctions require. This was the reason for the establishment of the Circuit Courts of Appeals in 1891 and the further enlargement of their jurisdiction in 1925. The Act of 1925, however, effected another very important change in this direction. It very largely gave the Supreme Court control of its appellate jurisdiction by practically abolishing the review of the decisions of the Circuit Courts of Appeals by writ of error or appeal and substituting instead review by certificate or certiorari. The effectiveness of this change is recognized when it is noted that review of cases by writ of error or appeal is under the control of litigants whereas review by certificate is controlled by the Circuit Courts of Appeals and review by certiorari is at the discretion of the Supreme Court.

In other words, discretionary jurisdiction has been substituted for obligatory. By certificate, the Circuit Courts of Appeals can ask the opinion of the Supreme Court on a point of law without submitting the entire case and by a writ of certiorari the Supreme Court can bring before it for review such decisions of the Circuit Courts of Appeals as it desires.

The Supreme Court exercises appellate jurisdiction at both law and equity over the decisions of the following courts: (1) the District Courts of the United States, (2) the Circuit Courts of Appeals, (3) the Court of Appeals of the District of Columbia, (4) the Court of Claims, (5) the Court of Customs Appeals, (6) the Supreme Court of the Philippines, and (7) the state courts. This enumeration is intended merely to indicate the broad scope of the Supreme Court's appellate jurisdiction. The most important part of this jurisdiction is the review of the decisions of the District Courts, Circuit Courts of Appeals, and the state courts of last resort. The Supreme Court has no power to review *directly* the orders or decisions of boards and commissions, but may do so *indirectly* through the review of decisions of lower courts.

From the decrees of the District Courts, appeals may be taken to the Supreme Court in three classes of suits at equity: (a) those brought by the United States to enforce the anti-trust or interstate commerce laws; (b) those to secure interlocutory or final injunctions to prevent the enforcement of either a state statute or an administrative order of a state board or commission; (c) those to enjoin the enforcement of the orders of the Interstate Commerce Commission other than those for the payment of money. The Supreme Court may also review certain decisions of the Dis-



trict Courts in criminal matters if the decision is adverse to the United States. The review of the decisions of District Courts is by writ of error or appeal.

The Supreme Court has appellate jurisdiction to review all the decisions of the Circuit Courts of Appeals in both civil and criminal matters. This jurisdiction is exercised by certificate, certiorari, or writ of error or appeal. By certificate, the judges of the Circuit Courts of Appeals can certify questions of law to the Supreme Court which may at its discretion content itself with answering the question or take jurisdiction of the entire case. By certiorari, the Supreme Court may review any of the decisions of the Circuit Courts of Appeals just as if they had been brought before it by writ of error or appeal. When a decision of a Circuit Court of Appeals is against the validity of a state statute on the grounds of its repugnancy to the Constitution, laws, or treaties of the United States, a review by the Supreme Court may be secured by writ of error or appeal, but in such instances the Court will limit itself to the federal question involved. It should be noticed that under the Act of 1925, the Supreme Court has a much broader appellate jurisdiction over the decisions of the Circuit Courts of Appeal by certiorari, which is optional, and a much narrower jurisdiction by writ of error or appeal, which is obligatory, the latter being restricted to only one very narrow class of cases, than was formerly the case. Hence, it can practically determine the scope of this jurisdiction.

The Supreme Court has appellate jurisdiction over the final judgments or decrees of the highest court of a state in which a decision of the case could be had (1) by writ of error when the decision is (a) against the validity of a statute or treaty of the United States, or (b) when in favor of the validity of state statute alleged to be repugnant to the Constitution, laws, or treaties of the United States, and (2) by certiorari, regardless of how the federal question is decided, in (a) cases involving the validity of a statute or treaty of the United States, (b) cases involving the validity of a state statute on the grounds of its repugnancy to the Constitution, laws, or treaties, and (c) cases involving title, right, privilege, or immunity claimed under the Constitution, laws, or treaties. Omitting the method by which review of the above cases may be had, they may be grouped into three classes: (1) those involving the validity of a statute or treaty of the United States, (2) those involving the validity of a state statute on the grounds of its repugnancy to the Constitution, laws, or treaties, and (3) those in-

volving title, right, privilege, or immunity under the Constitution, laws, or treaties. It is important to notice that in the above cases appellate jurisdiction is exercised by the Supreme Court only after the litigant has exhausted the opportunity to assert his federal rights afforded by courts of his state. When this requirement has been met, the Supreme Court, in a proper case, will review the decision even though it may have been made by a Justice of the Peace.

The Supreme Court may exercise appellate jurisdiction over all the decisions of the Court of Claims by either certificate or certiorari. The final decrees or judgments of the Court of Customs Appeals in cases involving the Constitution, laws, or treaties of the United States, upon petition of either party, or other cases upon a certificate of expediency by the Attorney General may be reviewed by the Supreme Court by certiorari. It may also re-examine the final decrees or judgments of the Supreme Court of the Philippines in cases involving (a) the Constitution, laws, or treaties of the United States, or (b) a controversy in which the amount of money in question exceeds \$25,000, and (c) the title or possession of real estate exceeding \$25,000 in value.<sup>43</sup>

(4) Court of Claims. The Court of Claims, established in 1855, consists of a Chief Justice and four judges, and holds an annual session at Washington. Any three judges constitute a quorum, but the concurrence of three judges is necessary for a decision in any case. The jurisdiction of the court extends to all claims against the United States except those for pensions, whether based on the Constitution or laws of the United States, regulations of an executive department, government contracts, or cases for damages, excluding torts, in which the party injured is entitled to redress by the government.

(5) The Customs Court. The Board of United States General Appraisers was by the Act of May 28, 1926, converted into the Customs Court, consisting of a Chief Justice and eight Associate Judges, with headquarters at New York City.<sup>44</sup> The Court hears complaints of importers against the classification and valuation of merchandise made by the collectors at ports of entry. The protest must be filed within sixty days after the entry of the merchandise and the case is then docketed. American producers, manufacturers,

<sup>43</sup> See William Howard Taft, "Appellate Jurisdiction," 35 *Yale L. Rev.*, 1.

<sup>44</sup> The Court also sits at Boston, Philadelphia, Baltimore, Chicago, New Orleans, St. Louis, St. Paul, Seattle, Portland (Oregon), San Francisco, and Los Angeles.

and wholesalers may appear as interested parties. Reappraisal may be made by a single judge with either the government or the importer having the right to a rehearing by a division consisting of three judges.

(6) The Court of Customs Appeals. This court was established by the Act of August 5, 1909, and consists of a Presiding Judge and four Associate Judges. Three Judges constitute a quorum and are necessary for any decision. The Court normally sits at Washington, though terms may be held in any circuit. It is always open for business. It hears appeals from the Customs Court and its own decisions may be reviewed as previously indicated.

(7) The Courts of the District of Columbia. Congress has established for the District of Columbia a system of courts that answers the purposes of both state and national courts. Its Police Court consists of six judges appointed for six years and exercises an original jurisdiction in criminal cases except those of an infamous or capital nature, libel, conspiracy, and violation of the postal and pension laws. The Juvenile Court, consisting of one judge appointed for six years, has jurisdiction of cases involving persons under nineteen years of age which otherwise would be tried in the Police Court. Corresponding to these criminal courts is the Municipal Court of five judges appointed for four years which exercises original and exclusive jurisdiction in all civil cases in which the value of the property or amount of damages involved does not exceed \$1000.

The Supreme Court of the District consists of a Chief Justice and five Associate Judges and exercises the jurisdiction of a District Court of the United States and a state court of original general jurisdiction. It sits in civil, equity, and criminal divisions. Its civil jurisdiction is restricted to cases involving more than \$1000 in amount and its criminal jurisdiction includes those cases not within the jurisdiction of the Police Court. It also hears appeals from the executive departments except the post-office. The law applied by the Courts of the District is a common law code, the principles of equity and admiralty, and the acts of Congress applicable to the District.

The Court of Appeals of the District is composed of a Chief Justice and two Associate Justices appointed for life by the President and Senate. It exercises appellate jurisdiction over the decisions of the Supreme Court of the District except in bankruptcy proceedings, the Commissioner of Patents, the Board of Medical Supervisors of the District, and the Post Office Department.

Appeals from its decisions may be taken to the Supreme Court of the United States by writ of error or appeal in cases involving jurisdictional questions, prizes, and federal questions. The Supreme Court will also consider certified questions on points of law or may by certiorari review any of the decisions of the Court of Appeals which in its opinion are of sufficient importance.<sup>45</sup>

<sup>45</sup> The Territorial Courts, which are not federal courts, are briefly considered in connection with the governments of the territories.



## CHAPTER XXIX

### NATIONAL JUDICIARY: ITS OPERATION AND RELATIONSHIPS

#### I. THE LAW APPLIED BY THE FEDERAL COURTS

There are six fairly distinct types of law enforced by the Federal Courts: (1) international law, (2) constitutional law, (3) common law, (4) equity, (5) admiralty or maritime law, and (6) statutory law. Each of these types has its own history and distinctive characteristics, yet in their contemporary development they interacted upon each other in such a way as to make it difficult in some instances and even undesirable at times to draw sharp lines of distinction between them. Frequently the principles of two or more of them are applied by the same court in the same cases.

(1) *International Law* or the Law of Nations is, says Hershey, "that body of principles, rules, and customs which are generally recognized as binding upon the members of the International Community of States in their relations with one another or with the nationals of other states."<sup>1</sup> Roughly speaking international law is derived from two great sources: (a) custom based on the tacit consent of nations and their desire for a certain degree of uniformity in their relations with one another and (b) convention or express agreement by means of treaties. The evidences of international law may be discovered in (a) the writings of international jurists, (b) the decisions of judicial and arbitral tribunals, (c) proceedings of international congresses, and (d) the utterances of statesmen and diplomatic practice. International law was recognized as early as 1765 as a part of the law of Great Britain, and when the United States entered the family of independent nations, it became amenable to the law of nations.<sup>2</sup> Chief Justice Fuller, speaking for the Supreme Court in 1902, said: "Sitting, as it were, as an international, as well as a domestic tribunal, we apply Federal law, state law, and international law, as the exigencies of the par-

<sup>1</sup> *The Essentials of International Public Law and Organization* (Rev. Ed., 1927), I.

<sup>2</sup> *Chisholm v. Georgia* (1792), 2 Dallas 419.

ticular case may demand.”<sup>3</sup> It was by virtue of the relation of international law to the law and obligations of the United States that the Constitution vests Congress with the power “to define and punish piracies and felonies committed on the high seas and offenses against the law of nations.”

(2) *American Constitutional Law* may be said to consist of the written constitutions, both national and state, and their judicial interpretations. Any written constitution must be interpreted and when this power of interpretation is exercised by the courts as is the case in the United States, there necessarily develops a constantly increasing body of rules and principles contained in their decisions which in the course of time come to constitute the great bulk of the constitutional law of the country. American constitutional law, therefore, contains both a written and an unwritten element, and has become so complex as to require a lengthy and elaborate treatise, covering the decisions in almost three hundred volumes of the Supreme Court reports, not to mention those of the state and inferior federal courts, to give a satisfactory statement of its principles.

(3) *The Common Law* of the United States is primarily the common law of the American states, differing somewhat from state to state, and is based on the English Common Law, which was called common because it was the law of the land and applied by all the King’s ordinary courts. It was derived from popular customs which had been so long established and so completely governed the relations of the people that the courts resorted to them for the principles by which to decide the cases brought before them. The English courts began to make memoranda of their decisions and later adopted the practice of committing their decisions to writing and of publishing judicial reports. Hence, the common law or the unwritten law came to be called judge-made or case-made law because the judges in the several courts were its depositories and the living oracles, who, in cases of doubt, must, under oath, decide according to the law of the land. The judges adopted the principle of following precedent; that is, in deciding cases, they applied old principles to new cases if similar in character. It was only when a new type of case developed that a new precedent was set, and in this way the common law developed.

When Englishmen came to America, they brought the principles of the common law with them. It thus happened that the structure of American jurisprudence came to be based on the original

<sup>3</sup> *Kansas v. Colorado* (1902), 185 U. S. 125.

foundations of the English common law. In the United States, however, the common law has undergone many modifications and now differs considerably from state to state. Rules unsuited to American conditions have been modified in some instances and in others abolished altogether.

In theory and for the most part in practice the federal courts apply the common law of the state in which they are sitting. There are at least three classes of cases in which it seems that they may exercise an independence of judgment and these are: (1) cases involving commercial law, (2) cases involving interstate commerce when there is no controlling federal statute, and (3) cases of a certain character between states. In such instances, the federal courts may happen to agree with the holdings of the courts of the state in which they are sitting as to the common law, but this is incidental, and is not always the case. Their decisions in such cases are national in scope and are the same as if they had been sitting in any other state. In these fields, limited though they are, the federal courts have created a body of unwritten or non-statutory law, which, of course, is far from being a complete system of law. Despite the repeated pronouncements of the Supreme Court to the contrary, it is difficult to see why this new creation of judge-made law should not be called "Federal Common Law."

(4) *Equity*. The general tendency of any system of law is toward conservatism. It tends to become rigid and stereotyped. Judges and lawyers resist changes in its forms and procedure. They become victims of precedent or judicial tradition and are, therefore, inclined to adjudicate any new case in the light of a previous case. This is what happened in the development of the common law. The rigorous application of precedent frequently worked injustice to the litigant, but the common law courts of Great Britain felt that this was preferable to a departure from the settled rules of the law which might result in its uncertainty. Common law was not progressive enough as it was developed by the courts to meet the remedial needs of a growing society. It was to supply this inadequacy of the common law that a system of equity was developed. If the common law offered no remedy or an inadequate remedy or worked an injustice in a particular case, it became customary for the suitor to petition the King for justice. This practice has generally been characteristic of primitive societies.

The officer through whom the King generally acted on such petitions was his Secretary, who in the course of time came to be known as the Lord High Chancellor, the Keeper of the King's

Conscience, and his court was called the Court of Chancery. This court, therefore, came to be the channel through which the King's equity was administered. This court was at first less formal in its procedure than the common law courts. Its practice was simply to get at the facts in a particular case and decide on this basis what was right and equitable to the parties to the suit. Equity was at first opposed by the commoners of Great Britain because the Lord High Chancellor was under the King's control until cabinet government developed.

By the time of the American Revolution equity had developed into a system almost as fixed and rigid as that of the common law. It also came to be founded on precedent. Although equity was regarded with suspicion by the American colonists because of its close association with the King, they were compelled to use it and either to establish separate courts of equity for its administration or vest common law courts with equity jurisdiction. In the majority of the American states, legal and equitable remedies are administered by the same court without any difference in procedure. In the Federal courts the distinction between law and equity and between legal and equitable remedies is rigidly maintained, though both systems are administered by the same courts.

Equity developed as a supplementary element to the common law as a means of affording a complete system of justice. The key to equity is that it will not suffer a wrong without a remedy. It acts *in personam*; that is, it commands a person to do or not to do a thing. Equity compels performance while the law grants damages. Equity is composed of a great body of rules or maxims such as "He who seeks equity must do equity."

(5) *Admiralty or Maritime Law* developed in connection with commerce and is, therefore, as old as civilization itself. Its chief highway has always been the sea which has given to it an international contact and character. Merchants in conducting maritime business developed a body of rules or principles for its regulation. Admiralty law became as necessary as the common law and equity, which were restricted to domestic or national affairs. In Great Britain, where a separate court developed for almost every phase of the law, admiralty law was administered by the High Court of Admiralty until judicial reorganization gave admiralty jurisdiction to the probate, divorce, and admiralty division of the High Court of Justice.

In the United States, there are no separate courts of admiralty. Admiralty jurisdiction is vested exclusively in the courts of the



United States and is exercised in the first instance by the District Courts with review of their decisions by the Circuit Courts of Appeals and the Supreme Court. It extends to (a) maritime contracts and torts, (b) collisions at sea, (c) prize cases during war, and (d) similar matters arising out of the navigation of the public waters of the United States.

(6) *Statutory Law*. Statutory law is the acts of a legislative body. It is the written will of a legislative body solemnly expressed according to the forms necessary to constitute it the law of the state. In Great Britain, Parliament did not acquire the right to legislate in its own name until the common law and equity had reached a very mature stage of development, but because statutory law is the formal or written expression of the will of the State, it supersedes, in cases of conflict, the informal or unwritten law.

In Great Britain, there is no limitation on statutory law because there is no distinction between constitutional law and statutory law, but in the United States statutory law must be in pursuance of our written constitutions. The courts of the United States apply both federal and state statutes; however, if a state statute is contrary to the Constitution of the United States, its laws, or treaties, it violates "the Supreme Law of the Land" and is void. State statutes dealing with substantive rights are enforced by the Federal Courts such as the statute of frauds or those governing assignments for the benefit of creditors or the liability of municipal corporations. In such matters the Federal Courts will follow the decisions of the highest courts of the states. Great inconvenience and injustice would result if Federal Courts differently construed state constitutions and statutes. The general rule is, therefore, for the courts of the United States to accept and apply the decisions of the state courts of last resort on matters involving an interpretation of the constitution or statutes of their respective states.

The relation of these various forms of the law to one another is very important in understanding their application. In the first place, the Constitution of the United States, its laws, and treaties are the Supreme Law of the Land. Any provision of a state constitution or statute in conflict with either of these three elements of the Supreme Law of the Land is void. The Constitution of the United States is supreme over an act of Congress or a treaty made by the President and Senate. A constitutional act of Congress and a treaty are on a parity with each other; if they conflict with each other, whichever is the later, prevails. A statute of either Congress or the states in conflict with either equity or the common law pre-

vails. Common law as against equity must be applied if it affords a complete and adequate remedy.

## II. JUDICIAL OFFICIALS

1. *Federal Judges.* There are three classes of United States Judges exclusive of those of the special courts: (a) District Judges, (b) Circuit Judges, and (c) the Chief Justice and the Associate Justices. A District Judge may sit in a Circuit Court of Appeals or a Circuit Judge or a Circuit Justice (a Supreme Court Justice) may sit in a District Court but this does not change his rank. However, the vote of a District Judge, sitting in a Circuit Court of Appeals, counts the same as that of a Circuit Judge. The Circuit Court of Appeals is not infrequently composed of one Circuit Judge and two District Judges and in such instances the votes of the District Judges against that of the Circuit Judge would be the decision of the court. The rank and title of the Federal Judges remain the same regardless of the court in which they may be sitting, though their powers change.

Federal Judges are appointed by the President, "by and with the advice and consent of the Senate,"<sup>4</sup> hold office "during good behavior,"<sup>5</sup> are removable only by impeachment,<sup>6</sup> and their compensation cannot be "diminished during their continuance in office."<sup>7</sup> It was by these means that the Forefathers intended to give the judiciary the security and independence necessary to make it a distinct and separate department of the government. "The complete independence of the courts of justice," said Hamilton, "is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance as that it shall pass no bills of attainder, no *ex-post-facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, *whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void.* Without this, all the reservations of particular rights or privileges would amount to nothing."<sup>8</sup> It is undoubtedly true

<sup>4</sup> *The Constitution*, Art. II, Sec. 2.

<sup>5</sup> *Ibid.*, Art. III, Sec. 1.

<sup>6</sup> *Ibid.*, Art. I, Sec. 2.

<sup>7</sup> *Ibid.*, Art. II, Sec. 2. It was held in *Evans v. Gare* (1920), 253 U. S. 245, that a federal income tax did not apply to the salary of a federal judge.

<sup>8</sup> *The Federalist*, No. LXXVIII (Lodge Ed., 484-85).

that the constitutional safeguards of the judiciary have been largely responsible for that integrity and independence of the Federal Bench which have so clearly differentiated it from those of the states.

2. *District Attorneys.* A District Attorney is appointed by the President and Senate, upon the recommendation of the Attorney General, for a term of four years for each judicial district to act as the prosecuting attorney for the United States in his district. He must be learned in the law whatever that means. It is his duty to prosecute, in his district, all delinquents for crimes and offenses cognizable under the authority of the United States, and all civil actions in which the United States is concerned, and, unless otherwise instructed by the Secretary of the Treasury, to appear in behalf of the defendants in all suits or proceedings pending in his district against collectors, or other officers of the revenue, for any act done by them or for the recovery of any money exacted by or paid to such officers, and by them paid into the Treasury.”<sup>9</sup> The salaries of District Attorneys are fixed by the Attorney General within the range of \$3,000 to \$7,500 a year, varying with the amount of business in the district.<sup>10</sup>

3. *Marshals.* A marshal is appointed by the President and Senate for a term of four years for each district and he may appoint one or more deputy marshals known as field marshals to assist him if the public interest requires it. He is the executive officer of the national courts. He apprehends offenders against national law and has the custody of witnesses and persons awaiting trial or convicted in United States Courts and held in county or state institutions in his district. He collects the sums due the United States and is the disbursing officer for the Federal Courts of his district. The salaries of marshals range from \$3,000 to \$6,500 a year.

4. *United States Commissioners.* The United States Commissioner is a ministerial officer associated with the District Court. The court may appoint one or more such officers for each district for a term of four years subject to removal by the court. The Commissioner does not hold court and is not a judge in the constitutional sense, but is rather a part of the administrative machinery of the District Court. He acts as a committing magistrate and

<sup>9</sup> 28 U. S. C. A., Sec. 485.

<sup>10</sup> The salaries of the District Attorneys for the southern district of New York, the northern district of Illinois, and the District of Columbia may not exceed \$10,000.

in this capacity exercises judicial powers. He cannot punish for contempt committed in his own presence and is compensated by fixed fees. He must keep a record of all criminal proceedings and affix his seal to all his official acts.

5. *Probation Officers.* By Act of March 4, 1925, the United States Courts, except in the District of Columbia, vested with original criminal jurisdiction, were granted power to "appoint one or more suitable persons to serve as probation officers" to investigate cases referred to them by the court and to report on the conduct or condition of persons on probation. The probation officers are merely agents of the Federal Judges to help administer effectively the criminal probation system.

### III. PROCEDURE IN UNITED STATES COURTS

In addition to the substantive law previously explained, that great body of law dealing with positive duties and rights, there is what is called adjective or procedural law, which determines the method of procedure of the courts in their application of the substantive law. In other words, the courts in their operation must observe certain rules or forms for their acts to be valid. The procedural law for United States Courts is based partly upon the statutes of Congress and partly on the rules of the courts themselves and is so technical in character that it is of primary interest only to judges and lawyers. Our purposes, therefore, must be served by a statement of some of its more simple and elementary principles. In general it may be said that despite the fact that procedure in Federal Courts is more expensive to the litigant than in state courts, they are preferred to state courts in cases of concurrent jurisdiction because of the higher standing of the Federal Bench, and in cases involving constitutional questions because they reach their final decision more quickly than if initiated in state courts.

1. *Procedure in Equity.* While United States Courts administer both law and equity, their procedure in a suit at equity differs from that in a case at law. In a suit at equity, all the proceedings of the trial are in writing. The testimony of the witnesses and the arguments of the attorneys are in writing, though in the appellate jurisdiction of the Supreme Court in suits at equity oral arguments may be presented in addition to written arguments. There is no use of the jury system in equity procedure. The court is the judge of both the law and the facts. The legal fraternity speaks of a suit



at equity or a chancery suit and a case at law. Judges in courts at equity render decrees and, in cases at law, decisions. The decrees in equity are commands of the court to do or not to do a specific thing. For instance, a suit at equity may result in a decree that an individual shall perform his contract under penalty of imprisonment for failure to do so. Failure to comply with the decree of the court would be contempt of court. In a similar matter, a case at law might terminate in an award of damages, but, if in such a case the party against whom damages were assessed was financially irresponsible, the plaintiff though technically winning his case has secured no damages or inflicted no punishment. In other words in a matter of this kind law does not afford an adequate remedy while equity does.

2. *Procedure at Law.* When exercising original jurisdiction in cases at law, the United States Courts make use of a jury, oral testimony of witnesses, oral arguments by the counsel, and a charge to the jury by the court. After the arguments by the counsel have been made, the judge explains the law involved in the case and may also comment on the evidence, adding whatever instructions to the jury have been requested by the counsel and accepted by the court. Except in important cases and then by permission of the court, only one hour for argument is permitted to each side. The Justices are rather free in addressing questions to the counsel during the argument. The jury, which in Federal procedure, must consist of twelve men and render a unanimous decision, then, after deliberation, delivers a verdict. If the judge of the court accepts this verdict, he renders the decision of the case, but he may set the verdict aside as being contrary to the law or the evidence in the case. The latter is not an infrequent practice of Federal judges, but in such instances they must order a new trial. They also take cases from the hands of a jury and decide them from the bench when the evidence points to an unmistakable conclusion.

3. *Procedure in the Supreme Court.* "The trial of issues of fact in the Supreme Court, in all actions at law against citizens of the United States, shall be by jury."<sup>11</sup> Trial by jury before the Supreme Court as a matter of fact is exceedingly rare.<sup>12</sup> Cases are presented to the Supreme Court by printed briefs containing the arguments of the counsel, by the printed record of the trial of

<sup>11</sup> 28 U. S. C. A., Sec. 343.

<sup>12</sup> Charles Warren, *The Supreme Court in United States History*, I, 124, note 2.

the case in the lower courts, and by oral arguments of the counsel. Sometimes the printed material in a case covers several thousands of pages. The Chief Justice or in his absence the senior Associate Justice presides over the sessions of the Court and at its conferences, and announces its orders. Popular interest naturally centers in the Chief Justice because he is the titular head of the Court and its executive officer. "By virtue of the distinctive function of the Court," says Charles Evans Hughes, "he is the most important judicial officer in the world; he is the Chief Justice of the United States."<sup>13</sup>

Aside from administrative routine, the Chief Justice is one among equals since every action of the Court requires the concurrence of a majority of its members. After arguments on a case have been heard and the records and briefs have been examined by each member of the Court separately, the Justices meet in a conference to compare views and reach a decision. The Chief Justice, unless he desires otherwise, gives his opinion first but votes last. If the Chief Justice is particularly able, he may, by virtue of expressing his opinion first, exercise a strong influence over the views of the other members of the Court. The procedure, however, is such as to afford each member an opportunity for real leadership. After a discussion of the case, the Justices determine the decision of the Court by a vote. If the Chief Justice happens to be a member of the majority, he assigns the case to one of the Justices of the majority to write the opinion of the Court in the case; if, however, he is a member of the minority, the senior Associate Justice of the majority assigns the case for opinion; subject to this limitation which is self-imposed, the Chief Justice may reserve for himself such cases as he pleases. In the distribution of cases, attempt is made to assign to each Justice about the same proportion of important cases. This method of assigning cases in contrast with that of rotation practiced by some courts forces each Justice not only to prepare his opinion with great care and to defend it, but understand that his vote may determine that it will be his responsibility to write the opinion of the majority of the Court. It may happen that the services of an able and industrious Justice in the conference constitute his most important contributions to the Court and the nation. Judge Campbell, in speaking of the services of Justice Curtis in the conference, said: "It was here that the merits of Justice Curtis were most conspicuous to his associates. . . . Justice Curtis always came to the conference with full

<sup>13</sup> *The Supreme Court of the United States*, 56.

cognizance of the case, the pleadings, facts, questions, arguments, authorities. He participated in the discussions. His opinion was carefully meditated. He delivered it with gravity, and uniformly it was compact, clear, searching, and free from all that was irrelevant, impertinent, or extrinsic. As a matter of course, it was weighty in the deliberations of the Court."<sup>14</sup>

The Supreme Court at first reduced its opinions to writing in only important cases. It was not until 1834 that this practice was made an order of the Court. One of the most important features of the procedure of the Court is its custom of issuing a dissenting opinion. It is by this means that a mere formal unanimity secured at the expense of research and conviction is prevented from destroying the character and independence of the Justices. Regrettable as lack of unanimity and the five-to-four decisions are, the confidence of the public in the Court will in the end rest primarily on its belief in the honesty and courage of its members. Moreover, dissenting opinions not only have an important influence on the development of the law but have in a number of important instances become the law.<sup>15</sup> Sometimes the Court, before a decision is reached, orders a reargument of a case, due to an equally divided court, since cases are not infrequently heard by less than a full bench on account of absence or disqualification of a Justice.

4. *Important Writs Used in Federal Procedure.* The most famous writ known to law is the writ of *habeas corpus* (you have the body). It took its name from the words conveying its meaning when the records of the English courts were written in Latin. While the exact date and circumstances of its origin are lost in the mists of time, it has been used for many centuries to remove the illegal restraint upon personal liberty, no matter by what authority imposed, and is, therefore, frequently called the writ of liberty. It is a writ directed by the court issuing it to the person detaining another in prison commanding that the prisoner be brought before the court for the purpose of determining the cause and legality of his imprisonment. Its purpose is not to determine the guilt or innocence of parties, but to prevent arbitrary arrest and illegal imprisonment. The questions of fact and law arising in the hearing before the Court are decided by the judge without a jury. It is the duty of the court to release the prisoner if his detention is illegal. The main effect of the writ is thus accom-

<sup>14</sup> Quoted in *Ibid.*, 63-64.

<sup>15</sup> For a list of cases that have been reversed, see *Ibid.*, 68-70.

plished by affording a speedy or summary inquiry without the usual and orderly process of the law. It is undoubtedly the greatest device civilization has yet invented in the interest of personal liberty.

The Constitution of the United States provides that the privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it.<sup>16</sup> The power of the courts of the United States to issue the writ of *habeas corpus* is restricted by law to those cases in which (1) the prisoner "is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or (2) is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process or decree of a judge or court thereof; or (3) is in custody in violation of the Constitution or of a law or treaty of the United States; (4) being a citizen or subject of a foreign state, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity whereof depends upon the law of nations; or (5) unless it is necessary to bring the prisoner into court to testify."<sup>17</sup>

Another writ of high prerogative which is used by the United States Courts is the writ of mandamus. Like the writ of *habeas corpus*, it is a common law writ and is issued by a superior court to compel a natural person, corporation, official, or a lower court within the jurisdiction of the former to do a particular thing therein specified and related to their duty or office. It is an extraordinary remedy and can be employed only in cases in which the usual and ordinary modes of procedure are powerless to afford an adequate remedy to the aggrieved party. Its use by Federal Courts is regulated by statute. Before they will issue the writ, it must be shown (1) that there exists the legal right to have done the thing in question, (2) that the party to be coerced is the proper party and has the power to perform the act, (3) that a demand of this party has been made and performance refused, and (4) that justice cannot be had in any other way.<sup>18</sup>

Corresponding to the common law writ of mandamus is the writ

<sup>16</sup> Art. I, Sec. 9.

<sup>17</sup> 28 U. S. C. A., Sec. 453. The figures in parentheses are inserted for clearness.

<sup>18</sup> John Bouvier, *Law Dictionary* (Third Rev., 1914), II, 2074-2080.



of injunction which is used by the courts of the United States in proceedings at equity. The former requires the performance of a lawful or neglected act while the latter forbids the performance of an unlawful act. Failure to comply with the terms of the writ constitutes contempt of court punishable at the discretion of the court issuing the writ. Injunctions are issued by Justices of the Supreme Court, Judges of the District Courts, and, in case of absence or disability of a District Judge, by a Circuit Judge. In issuing injunctions, the Federal Courts follow the rules of equity, though they are subject to statutory regulation in this matter. Since this writ is an extraordinary remedy, Federal Courts will not issue it unless it is necessary for the adequate protection of the rights of the plaintiff. It may have the effect of restraining temporarily or permanently one or more parties or a corporation from doing an inequitable act. The scope of the uses of injunctions is of considerable legal, social, and economic significance and in recent years has been the subject of frequent and heated controversies because of the alleged abuse of the injunctive power by Federal Courts.<sup>19</sup>

#### IV. FEDERAL JUDICIAL COUNCIL

Primarily as a result of the efforts of Chief Justice Taft, Congress by Act of 1922 created a Judicial Council composed of the Chief Justice of the Supreme Court and the Senior Circuit Judge of each of the ten circuits. Under this act it is the duty of the Chief Justice, or in case of his disability, of one of the Justices of the Supreme Court in the order of seniority, to call a conference of the Senior Circuit Judges to meet on the last Monday in September at Washington, D. C., or at such other time and place as may seem desirable. If any Senior Circuit Judge is unable to attend, any other Circuit Judge or one of the District Judges of this circuit may be summoned to represent the circuit in the conference.

At the conference each Senior Circuit Judge or his representative makes a report based on the reports of the Senior District Judges of his circuit. The report of each Senior District Judge must show the condition of business in his district, "including the number and character of cases on the docket, the business in arrears, and cases disposed of, and such other facts pertinent to the business dispatched and pending as said district judge may

<sup>19</sup> William H. Taft, *Presidential Addresses and State Papers* (1910), 142-163, 191-200, 477-478.

deem proper, together with recommendations as to the need of additional judicial assistance for the disposal of business for the year ensuing." On the basis of these reports, the conference is expected to "make a comprehensive survey of the conditions of business in the courts of the United States and prepare plans for assignment and transfer of judges to or from circuits or districts where the state of the docket or condition of business indicates the need therefor, and shall submit such suggestions to the various courts as may seem in the interest of uniformity and expedition of business."<sup>20</sup> The Chief Justice may request the Attorney General to report to the conference "on matters relating to the business of the several courts of the United States, with particular reference to causes or proceedings in which the United States is a party."

It may be said that the conference will perform two important functions: (1) it will make authoritative recommendations to Congress for needed legislation concerning the judiciary and (2) will pool the ability and experience of the judiciary for the solution of its problems.<sup>21</sup> As to the first, the conference will have the facts as to the needs of the judiciary, and since matters of jurisdiction and court procedure are highly technical and non-partisan, Congress will doubtless be inclined to accept its recommendations. The relation of the conference to the lower federal courts is more immediate and compelling. In the first place, the Chief Justice and the Senior Circuit Judges supposedly represent the strongest influence in the appellate tribunals which review the decisions of the lower Federal Courts. In the second place, the contact of the Circuit Judges with one another and the District Judges of their respective circuits will invigorate and expedite the transaction of judicial business. Furthermore, a comparative study of the work of the courts of the different circuits and districts will touch their pride and stimulate their judges to greater efficiency. This reform is undoubtedly epoch making and means a more scientific administration of justice in so far as the courts of the United States are involved.

## V. THE RELATIONSHIPS OF THE NATIONAL JUDICIARY

The exceptional and unique position of the National Judiciary due to its power to review executive and legislative acts if they

<sup>20</sup> 28 U. S. C. A., Sec. 218.

<sup>21</sup> Frankfurter and Landis, *op. cit.*, 243.

are not political in character makes it the central and harmonizing agency of the American system of government. In performing this function, which by interpretation has been made a judicial function and is now generally so accepted, it necessarily exercises a certain amount of control of the Executive, Congress, and the states. The Supreme Court not only reviews the legislative acts of the states and the decisions of their courts if a federal question is involved in actual litigation, but it also hears and decides controversies in which the states as such are parties. It is, therefore, the final arbiter in the settlement of all disputes involving an interpretation of the Constitution, the laws, and treaties of the United States. It may be worth while briefly to summarize some aspects of these relationships.

1. *Judicial Control of the Executive.* "It is now well settled," says Burdick, "that executive officers, aside, at least, from the Chief Executive, are civilly liable for illegal or unconstitutional acts done in their official capacity. They may also be enjoined from doing illegal acts and from acting under unconstitutional statutes; and mandamus will lie against them to compel the doing of non-discretionary, ministerial acts, and to compel the exercise of discretion, but not for the purpose of directing the way in which their discretion shall be exercised."<sup>22</sup>

The President, however, is an officer of such dignity and importance as to place him in a different category. He is not regarded as subject to judicial control.<sup>23</sup> The courts will not subpoena him nor will they enjoin him from enforcing an alleged unconstitutional statute.<sup>24</sup> They will not mandamus him or his agents in purely political or discretionary matters or review their settlement of such matters.<sup>25</sup> While it is beyond controversy that the heads of the executive departments and their subordinates may be mandamusd to perform purely ministerial acts, the opinion prevails that judicial coercion in such matters cannot be exercised over the President.<sup>26</sup> "The only cases," says Goodnow, "where

<sup>22</sup> *The Law of the American Constitution*, 125.

<sup>23</sup> Frank J. Goodnow, *The Principles of Administrative Law of the United States* (1915), 91.

<sup>24</sup> *Mississippi v. Johnson* (1866), 4 Wallace 475.

<sup>25</sup> *Marbury v. Madison* (1803), 1 Cranch 137. Included among such matters are the recognition of foreign governments, settlement of boundary disputes between the United States and other nations, validity of ratification of treaties, and questions as to a state of war to which the United States is a party.

<sup>26</sup> Burdick, *op. cit.*, 127; W. W. Willoughby, *The Constitutional Law of the United States*, II, 1300.

the Courts can exercise any control over the President are those in which a regulation or order of the President comes up before them for execution when, if they regard it as an act in excess of the President's powers, they may refuse to enforce it, and declare it void."<sup>27</sup>

2. *Review of Legislation of Congress and Treaties.* The acts of Congress or treaties may invade the field of either the rights of the citizen or those of the states. Congress might pass an *ex post facto* law or attempt to abolish trial by jury. Congress has invaded the reserved powers of the states under the disguise of regulating interstate commerce.<sup>28</sup> If it were not for judicial review, the only recourse in instances of this kind would be the ballot box, which at best would be a very poor means of settling such conflicts. Congress might also undertake to impose additional powers upon the Executive or the Courts not conferred by the Constitution or to reduce the powers of the executive and judicial departments. The doctrine of judicial review makes it possible in any of the above situations for the individual, the state, or a coördinate branch of the government to protect its rights or powers by testing in court the validity of such acts of Congress as are involved. The Supreme Court as the final arbiter in these matters becomes the protector of the individual, the preserver of the division of powers between the departments of the government, and a barrier to the encroachment by Congress upon the powers of the states.

3. *Its Relation to the States.* The judiciary through the Supreme Court is very closely related to the states. Not only do their constitutions, their legislative acts, and the decisions of their courts come under its review, but the cases to which they are parties are heard and decided by it. In fact, the government of the United States operates upon the states primarily in its judicial capacity. There are three fairly distinct types of cases in which the acts of the states as such are involved: (1) those in which it is asserted that a provision of the state constitution or a state statute is in conflict with the Constitution, the laws or treaties of the United States; (2) those in which a right, authority, or immunity claimed under the supreme law of the land is in dispute, and (3) those between states. In the first two groups of cases federal relations are involved and some act of the state, a provision of its constitution, a legislative act, or one of its judicial

<sup>27</sup> *Op. cit.*, 92.

<sup>28</sup> The Child Labor Act of 1916 is an example. *Hammer v. Dagenhart* (1918), 247 U. S. 251.



decisions, is reviewed on the basis of its alleged violation of the supreme law of the land, but in the third class of cases interstate relations are involved and no inconsistency between the supreme law of the land and any state constitution, legislative act or judicial decision is alleged. The Supreme Court is a sort of an international court in such cases and usually applies the principles of equity. In the former type of cases the Supreme Court protects the rights of individuals and corporations, the powers of the national government from the encroachments of the states, and in the latter it adjudicates disputes between "indestructible states."

**Part III**  
State Government



## CHAPTER XXX

### THE STATE CONSTITUTIONS

The basis of state government in the United States is the Constitution of the United States, the state constitutions, state statutes, judicial decisions, both national and state, and custom or practice. The most fundamental of these is the state constitutions, which are for the states what the Constitution of the United States is for the nation. The constitutions of the states are their supreme law except in so far as they conflict with the Constitution, laws, and treaties of the United States.

#### I. THE ORIGIN OF THE STATE CONSTITUTIONS

Constitutions may be granted by a single individual, or enacted by the people directly or indirectly through representatives, or evolved. The Constitution of Italy was granted to Piedmont by Charles Albert, the reigning prince, in 1848. The Constitution of the United States became operative by virtue of the action of the representatives of the people of the states. The Constitution of Great Britain has evolved through the centuries. The chief difference between these methods is that the evolutionary process is less formal. It does not necessarily mean any difference in the character of the provisions of a constitution. Most constitutions are based upon the experience of one people, and sometimes of several.

The Colonial Charters granted by the English Crown to the American colonists may be regarded as the immediate ancestors of our present state constitutions. They were written documents setting forth the framework, powers, and duties of the colonial governments whose acts were disallowed by the Crown unless they conformed to the provisions of the charters. These charters were based upon English experience and custom and were so satisfactory to the colonists that following the Revolution they were in those colonies which had not lost their charters made the basis of their state governments. In Connecticut and Rhode Island the



same documents were retained with only a few changes until 1818 and 1842 respectively. Virginia was the first to adopt a constitution, taking this action more than a fortnight before independence was announced. New Jersey followed immediately, accompanied by six others before the year of independence had passed, with the five remaining states trailing in the following order: New York and Georgia (1777), South Carolina (1778), Massachusetts (1780), and New Hampshire (1784).<sup>1</sup> The constitutions adopted by South Carolina, Massachusetts, and New Hampshire at the above dates were revisions of previous constitutions.

## II. THE MAKING OF THE FIRST STATE CONSTITUTIONS

None of the first state constitutions was written by a constitutional convention or submitted to a popular vote for ratification for at least two very valid reasons.<sup>2</sup> In the first place, the conception of a constitutional convention was not current at the time, and in the second place, the war conditions hardly warranted the delay that the action of such a body would have required even if the idea had been prevalent. The Continental Congress had suggested that a "full and free representation of the people" of each state be called to draft its organic law. In South Carolina, Virginia, and New Jersey revolutionary legislatures, which had not been elected with constitution-making in mind, wrote and adopted their constitutions. In at least seven other states during the period (1775-1777) special elections were held for legislatures with the understanding that they were to draft and adopt constitutions. In most instances an honest effort was made to secure a fair representation of the people. Constitution-making was considered at this time only slightly more serious than the framing of a civil code. This idea combined with the disturbing circumstances of the time caused the first state constitutions to be hurriedly drafted and adopted.<sup>3</sup>

In the immediate revision of some of the state constitutions a more democratic method of drafting and adopting a constitution was devised. How was a government resting upon the consent of the governed to be established? Even if this could be done by a legislature under instructions from the voters with or without the

<sup>1</sup> Allan Nevins, *The American States During and After the Revolution, 1775-1789* (1924), 117-128; and Walter Fairleigh Dodd, *The Revision and Amendment of State Constitutions* (1910), 1-29.

<sup>2</sup> Nevins, *op. cit.*, 128.

<sup>3</sup> *Ibid.*, 138-139.

submission of the draft for approval, would it not place the constitution on a level with statutory law and thus destroy the principle of its being a superior or fundamental law? If the legislature could make the constitution in the first instance, it could change it thereafter to suit itself. In revising her constitution in 1780, Massachusetts devised an almost ideal method for the popular establishment of a government. The following steps were involved: (1) the voters were asked at the time of electing the legislature to instruct it, if they so desired, to call an election of delegates to a constitutional convention; (2) the legislature having been so instructed called the election; (3) the election was held and the delegates met and wrote a constitution; (4) the constitution was then submitted to the voters for ratification. There is not a single constitution in the United States, "national or state, that has not been either in its making or revision subjected to this principle of popular sovereignty."<sup>4</sup>

### III. THE CHIEF PROVISIONS OF THE FIRST STATE CONSTITUTIONS

1. *The Frame of Government.* The general scheme of executive, legislative, and judicial departments which had existed in the colonies was provided. The executive or governor, who had exercised rather strong powers during the colonial period as a representative of the English Crown, was deprived of most of his former powers and made elective either by the legislature or by the voters for a short term. The governor's veto was permitted in only Massachusetts. The legislature was bicameral except in Georgia and Pennsylvania, which in their revised constitutions of 1789 and 1790 respectively adopted the two-house system, and was popularly elected except in Maryland where the Senators were elected by an electoral college. The judicial systems were less disturbed by the Revolution, as might be expected. Election of judges by the legislature or appointment by the governor with or without the approval of the council or senate was substituted for appointment by the Crown.<sup>5</sup>

2. *Popular Sovereignty.* All the original constitutions either expressed or implied the doctrine of popular sovereignty. The people were considered the source of all power, and, therefore, could modify the form or powers of their governments to any extent

<sup>4</sup> James Quayle Dealey, *Growth of American State Constitutions* (1915), 24-32.

<sup>5</sup> In New York the judges were appointed by a committee of four senators and in Georgia they were elected by the voters. Dealey, *op. cit.*, 38.

or in any manner, even involving revolution, that they saw fit. Governors, legislatures, and courts were considered as their substitutes and agents. Popular sovereignty was regarded as a substitute for parliamentary sovereignty and should not be confused with state sovereignty.<sup>6</sup>

3. *Separation of Powers.* The principle of division of powers was strongly emphasized in six of these early constitutions. Its most emphatic declaration was made in the constitution of Maryland to the effect that "the legislative, executive, and judicial powers of government ought to be forever separate and distinct from each other." There was no serious effort made to define the principle of separation of powers, and as used in these first constitutions it meant, says Holcombe, "no more than that no one of the three departments of government should exercise the constitutional powers of another department."<sup>7</sup>

4. *The Reign of Law.* The framers of the original state constitutions felt that they had just severed their connection with an arbitrary government—a government of man as opposed to a government of law. They conceived the idea of placing government under a fundamental or supreme law enacted by themselves in a representative capacity and subject to change only with their approval. "Law, as the founders of the state governments used the term, meant," says Holcombe, "the will of the people as understood and formulated in the shape of constitutions and statutes, ordinances and by-laws, and other proper acts of authority by the people themselves or those to whom the power of law-making should be duly delegated."<sup>8</sup> The governments were not supposed to have any will of their own and the power to enact it into law, but were expected to discover the intent or wishes of the people from their fundamental law. A theory of natural law was a fundamental part of the political philosophy of the forefathers. The bills of rights found in some of these first constitutions were based upon natural law and provided for freedom of speech and worship, trial by jury, privilege of *habeas corpus*, and no taxation without representation.<sup>9</sup> The theory of natural law meant a limited government and reënforced the idea of a government of law. In other

<sup>6</sup> Arthur N. Holcombe, *State Government in the United States* (Rev. Ed. 1925), 30-31.

<sup>7</sup> *Ibid.*, 57.

<sup>8</sup> *Ibid.*, 37.

<sup>9</sup> Virginia, Pennsylvania, and Massachusetts set the pace in the matter of bills of rights. Bills of rights later became a common feature of the state constitutions.

words, governments were directed by a fundamental law, itself subordinate to a higher law, which might be invoked for revolutionary purposes.

5. *A Restricted Suffrage.* A property or tax-paying or religious qualification for the suffrage was a common feature of the first state constitutions. The incorporation of a limited suffrage considerably compromised the theory of popular sovereignty which was provided in the same documents and showed that in this matter the framers were still thinking in terms of English conditions. The frontier had not yet worked much of a revolution in the matter of suffrage.

6. *Provision for Amendment.* Seven states made no constitutional provision for amendment.<sup>10</sup> Since the constitutions of these states had been made by their legislatures, it was assumed that they would be amended by the same agents, acting, of course, as representatives of the people. In two states, Delaware and Pennsylvania (1789), the methods of amendment provided were calmly disregarded when they proved unworkable, this right apparently being regarded as superior to any fixed process. Georgia and Maryland provided for amendment by their legislatures. The constitution of Delaware and the revised constitution of South Carolina provided for changes by either their legislatures or conventions. The revised constitutions of Massachusetts (1780) and New Hampshire (1784) provided for amendment only by a convention.<sup>11</sup> There seems to have been little appreciation of the difference between amendment and revision, though Delaware and South Carolina provided a separate procedure for each.

It should be noted that the written constitution was generally accepted as the proper means for the formulation of the fundamental law in the states, although the Confederation worked under an unwritten constitution from 1776 to 1781. James Otis had said as early as 1761 that the constitution of a free state was fixed. Furthermore these constitutions were short and simple in phraseology as compared with the present state constitutions.<sup>12</sup> Most of the administrative and judicial officials of the first state governments were either appointed or elected by the legislatures. The

<sup>10</sup> New York, Virginia, North Carolina, Pennsylvania (1790), and New Jersey, New Hampshire (1776), and South Carolina (1776).

<sup>11</sup> Dealey, *op. cit.*, 32-33.

<sup>12</sup> See W. C. Morey, "The First State Constitutions and the Sources of American Federalism," 4 *Annals of the Am. Acad. of Pol. and Soc. Sci.*, 201-232 (1893), and W. C. Webster, "Comparative Study of the State Constitutions of the American Revolution," *ibid.*, IX, 380-420 (1897).



short ballot was used. Only the governor in a few states, state judges in Georgia, and the legislators were elected by the voters.

#### IV. GENERAL CONSTITUTIONAL TENDENCIES SINCE 1800

1. *State constitutions have constantly increased in length.* This has been due to a concurrence of causes. The American conception of a government of law logically leads to a constitution so detailed as to eliminate the discretion of governmental agents as far as possible. The first state governments were largely legislative governments. The forefathers were afraid of executives. They placed their trust in legislatures as the creatures of the people. They later learned that legislatures acting on the majority principle could not always be trusted. Hence a reaction developed taking the form of limitations upon the powers of the legislatures fixed in the constitutions. The fact that state governments exercised reserved powers instead of granted powers suggested limitations. The growth in the functions of government called for provision for additional administrative machinery which was made in the constitutions. The constitutions have tended to become social codes, elaborate provisions in some instances being made concerning taxation, education, and commercial matters. Of course, the placing of limitations in the state constitutions upon legislative powers would have a tendency to subject a larger amount of state legislation to judicial review and to substitute judicial for legislative supremacy. At the present time there is a reaction against long state constitutions. They increase litigation and burden the courts; make frequent changes necessary but more difficult to make, ending in a constitutional order not in harmony with the social and economic needs of society; shackle the hands of the legislatures and the courts; and suggest to the fanatics and reformers that another provision to the state constitution is the panacea for any social or moral ill.

2. *The constitutionalization of offices* has generally characterized the revision of older constitutions and the making of new. A constitutional office as opposed to a statutory office has its powers and duties, and frequently the salary of its holder, stated in the constitution. This gives a permanence to the office and some independence to the officer holding it. Distrust of legislatures and splitting executive authority have been factors in this development.

3. *Increase in the power of the governor* has been a constant tendency from the foundation of the state governments to the

present time. The federal analogy has been an influential factor in this change because the efficiency and vigor of the national government have generally been attributed to its strong executive. There has been a general turning away from the legislature to the governor. The governor has the veto power in every state in the Union except North Carolina; in more than two-thirds of the states he can veto items in appropriation bills, and in Washington and South Carolina he can veto sections of non-fiscal bills.<sup>13</sup>

4. *Extension of the Elective Principle.* The short ballot of the original state constitutions has been completely destroyed, but fortunately it has been restored in several states. The governorship has become an elective office in all of the states; many other executive offices have been created and made elective; the judiciary has been made elective in most states, as well as the membership of a number of committees, boards, and commissions. There has been operating a sort of half-baked philosophy that democracy consists merely of elections. The politician anxious to escape effective supervision has popularized the principle of making government responsible to the people. The result has been the crushing of the voter and the establishment of an irresponsible administrative system.

5. *The democratization of the suffrage* from its original highly restricted basis has possibly been the most radical tendency in state government. The frontier has undoubtedly been the strongest factor in this revolution; though at times social and moral factors have played a part.

6. *An increase in judicial control* over both legislative and executive agents not contemplated at all by the first state constitutions has been an outstanding tendency. The state courts began the practice of invalidating the acts of state legislatures in the decade following 1780. Distrust of legislatures was largely responsible for the assumption of this power by the courts. The Constitution of the United States, however, expressly conferred the power of judicial review upon state courts in the supreme-law-of-the-land clause.<sup>14</sup> This placed the state courts on an independent basis so far as this power was concerned. It could only be taken away from them by an amendment to the Constitution of the United States and this would not solve the problem, since the federal courts were exercising the same power with reference to state statutes or constitutions. The states were more willing to trust their own popu-

<sup>13</sup> Finla Goff Crawford, *Readings in American Government* (1927), 417.

<sup>14</sup> Art. VI.

larly elected judges with this power than the federal bench. Practically every development in the states, constitutional, economic, or commercial has extended the scope of judicial review.

7. *State centralization has been a marked tendency* in the last quarter of a century. The functions of local government and business enterprise both individual and corporate have come more and more under state control. Education, health, agriculture, public utilities, banking, road building, water power, traffic, and police, the taxing power of local governments, are among the more important subjects which have become subject to a more rigid state regulation. Business has become a semi-public affair and greater efficiency is demanded of local institutions. These have been very strong influences in extending state control.

8. *Growth in the power of the electorate* is not one of the minor changes of the last century. While the legislature has lost power to both the governor and the judiciary, the electorate has increased its control over all these departments of state government. Party government has come on the scene as the chief means of affecting popular control. In summarizing these movements in the states, an eminent authority says, "They have been produced by the continuous adaptation of the political institutions of the states to the needs of the people, as determined by the operation of the fundamental forces in American life, the biological, economic, and social forces that have made the American people what they are."<sup>15</sup>

## V. THE GENERAL CHARACTERISTICS OF THE PRESENT STATE CONSTITUTIONS

1. *The preamble* contains (a) a recognition of Almighty God in the affairs of men, (b) the reasons for establishing a government such as the securing of civil, political, and religious liberty, (c) the enacting clause, and (d) in about half of the states the demarkation of the boundaries of the state.<sup>16</sup> The enacting clause usually contains some such phraseology as "We, the people . . . do ordain and establish this Constitution."<sup>17</sup>

2. *The Bill of Rights*, called in twenty-four states the Declaration of Rights, varies in length from fifteen provisions in Louisiana to forty-five in Maryland, with about thirty as an average. The

<sup>15</sup> Holcombe, *op. cit.*, 143.

<sup>16</sup> The preambles of twenty-three constitutions contain this feature, though it is not a matter over which the states have final authority and really should be omitted.

<sup>17</sup> For variations in this clause, see Dealey, *op. cit.*, 121.

Bills of Rights make a rather elaborate declaration of the theory of popular government along the lines of popular sovereignty, equality before the law, and the doctrine of natural and inalienable rights. Following this announcement of the general principles of the nature and spirit of government, there is an enumeration of the fundamental safeguards to life, liberty, and property; freedom of conscience, speech, press, petition, and assembly; right of *habeas corpus* and trial by jury; and guarantees against unreasonable search, seizure, and imprisonment.

Bills of Rights have become too detailed and frequently contain matters that would more fittingly fall within the body of the constitution. They have as a result become in many instances a barrier to social legislation. The courts have been inclined to construe Bills of Rights rather strictly, especially with reference to property rights. In general the Bills of Rights are an expression of frontier individualism which is exceedingly difficult to apply in an entirely different type of society. There is possibly no part of the state constitutions that needs more radical revision.

3. *The Frame of Government.* There are three articles dealing with the legislative, executive, and judicial departments.<sup>18</sup> The article on the legislative department deals with its organizations; qualifications, terms of offices, and methods of election of its members; its sessions, pay, and rules of procedure; and the limitations upon its powers. The article on the executive vests the executive power of the state in a chief magistrate styled the governor and provides his qualifications, method of election, powers, term of office, removal, succession, and, unfortunately in some instances, his salary. Thirty-five states provide a lieutenant governor whose qualifications, term of office, and method of election are the same as those of the governor. He succeeds to the governorship in case of the removal, death, resignation, or absence of the governor, and in thirty-four states he is president of the Senate. The article on the executive differs from the one on the legislature in that it contains a grant of powers while the latter provides limitations. The organization, functions, and jurisdiction of the judiciary are frequently a matter of considerable detail, due to the expansion in the influence of the courts and the desire to place them beyond the reach of the legislature.<sup>19</sup>

<sup>18</sup> Thirty-three constitutions contain an article on the Distribution of Powers, which precedes the frame of government.

<sup>19</sup> For material for a comparative study of the present state constitutions, see Charles Kettleborough, *The State Constitutions* (1918).



4. *Miscellaneous Provisions.* Following the frame of government, though sometimes preceding, is the suffrage article. The states, subject to certain limitations previously discussed, have the right to declare who shall exercise the franchise in their jurisdictions and, with the growth of the suffrage from about six per cent to more than twenty per cent of our population and the extension of the functions of the electorate, the suffrage article has tended to increase in both length and detail. Likewise, there have been added numerous articles dealing with education, public institutions, taxation, corporations (both public and private), public lands, issue of public bonds, local government, immigration, water rights, labor, elections, militia, and administration. These articles vary from state to state due to different economic and social conditions and the recentness of constitutional revision. The more recently amended or revised constitutions have as a rule incorporated considerable social legislation in these provisions.

5. *The schedule*, though a temporary part of constitutions, has in most instances been made a separate article in the body of the constitutions. The chief purpose of this article, though in some instances other more material matter is included, is to provide a method for putting into operation a revised constitution and bridging the gap involved in the transition from the old to the revised constitution. Frequently these revisions change the terms and powers of officers, abolish considerable state machinery, reorganize courts, and change their jurisdictions. Great inconvenience and uncertainty about a large amount of business in process of settlement would be created unless provision was made for such matters. The schedule, however, should be kept separate from the body of the constitution by being placed last, or its subject matter handled by the exercise of the ordinance power of the convention.

6. *The Amendment Article.* State constitutions are amended by both informal and formal processes, though the informal methods are not considered by the strict legalists as amending processes. They include (a) custom and usage, (b) legislative elaboration, and (c) judicial interpretations, which are generally regarded as a development of the constitution in harmony with either its letter or its spirit. They usually constitute an unwritten constitution which must be understood if the practical and actual operation of our political machinery is to cease to be the mystery that it now is to most of our citizens.<sup>20</sup>

<sup>20</sup> See Frank G. Bates and Oliver P. Field, *State Government* (1928), 76-77.

There are three formal methods in use for amending state constitutions. Briefly these methods are: (1) legislative proposal and popular ratification, (b) popular proposal and ratification by the initiative and referendum, and (c) proposal by a constitutional convention and popular ratification. New Hampshire amends only by means of a convention. The legislative majority required for a proposal varies from a simple majority to a three-fifths or two-thirds vote of each house.<sup>21</sup> Sixteen states require the action of two legislatures on amendments. Of these, South Carolina and Mississippi require the referendum to be held between the actions of the legislatures, but Delaware requires no referendum at all, the action of the second legislature apparently being considered a sufficient check. Delaware is the only state in the Union in which a constitutional amendment may be made by the legislature alone. Of the forty-seven states using the referendum in the amending process, twenty-three require a majority of those voting for it to be effective.<sup>22</sup> In twenty-five states a referendum can be held in only a general election.<sup>23</sup>

## VI. THE CONSTITUTIONAL CONVENTION

1. *Its Origin.* The constitutional convention is an American institution and originated during the revolutionary period.<sup>24</sup> Two main ideas are responsible for its inception: (1) popular sovereignty and (2) the principle of the constitution as a fundamental law. If governments were to be popular, the people should have something to do with their establishment as well as their operation. If the constitution was to be maintained as a superior or fundamental law, the legislative body should not be allowed to change it or exercise constituent powers; otherwise a constitution would be a legislative act and though possibly more highly regarded, it would not be any more binding legally than any other statutory law. These considerations seemed to require that a clear distinction be made between legislative and constituent powers and that they be exercised by different agents. The constitutional convention was devised to meet this demand and was first used as a regularly constituted body by Massachusetts to draft the constitu-

<sup>21</sup> Seven states require three-fifths and seventeen two-thirds.

<sup>22</sup> Twelve have a sanction of a majority of the total electorate; Rhode Island a three-fifths and New Hampshire a two-thirds vote.

<sup>23</sup> For further details on amendment and revision, see Dealey, *op. cit.*, 139-149.

<sup>24</sup> Roger Sherman Hoar, *Constitutional Conventions* (1919), 1.

tion of 1780. It soon came to be the regular means for making or revising constitutions.<sup>25</sup> Twelve states make specific constitutional provision for a convention for purposes of revision.<sup>26</sup>

2. *Calling a Convention.* It is generally considered that a state legislature under the reserved-power doctrine has the right to call a constitutional convention,<sup>27</sup> yet it is better to make constitutional provision for calling a convention at such times as the legislature sees fit.<sup>28</sup> However, only two states, Maine and Georgia, permit their legislatures to call a convention without approval by a referendum. Seventeen states require that the referendum on calling a convention be authorized by a two-thirds vote of each house. It is difficult to see why the calling of a convention should be subject to a referendum for at least two reasons: (1) the answering of this question depends on technical information which the voters do not, and, in the nature of things, cannot have; and (2) the referendum on the revised constitution is a sufficient check. Moreover, two referendums, unless one is held in connection with a regular election, and an election of delegates in case the convention is called, are not only unnecessary but too expensive. The size of the popular vote required to call a convention varies from a majority of those voting to a majority of those voting at a general election. It is difficult to secure a very large vote on a matter of this kind, and, therefore, easy for a state that uses this method of calling a convention to make it exceedingly difficult to revise its constitution.<sup>29</sup>

3. *The Size of the Convention.* It is safest to provide for a relatively small convention in the constitution, the basis of representation being stated. The membership of the State Senate doubled with half of it elected at large would meet all requirements. Previous conventions have varied in membership from eighty to four hundred. A small convention will come nearer to representing the state as a whole, will likely be composed of a better calibre of membership, and can work in a much more deliberate fashion than a convention unwieldily large. An erroneous idea seems to

<sup>25</sup> Revision as opposed to amendment is generally considered to imply a more thorough and complete remaking of a constitution than an amendment.

<sup>26</sup> Mass., Conn., Vt., R. I., N. J., Penn., Miss., La., Tex., Ark., Ind., N. D.

<sup>27</sup> John Alexander Jameson, *Constitutional Conventions* (4th Ed., 1887), 601-615.

<sup>28</sup> Maryland, Ohio, Oklahoma, New York, require their legislatures to submit the question of calling a convention to a referendum every twenty years; Michigan every sixteen; Iowa, ten; and New Hampshire, seven.

<sup>29</sup> See Dealey, *op. cit.*, 143-144.

prevail that representation consists of numbers. A large convention is generally so actuated by localisms that the state as a whole is not represented. The matter of nomination, election, convening, and compensation of the delegates to a convention is usually left to the discretion of the legislature, though in some states, New York, Michigan, and Missouri, the constitutions contain detailed provisions on these matters.

4. *Organization and Procedure.* The convention meets at the state capital on the day fixed by law and proceeds to organize by electing one of its members chairman and appointing the necessary committees. Its members do not take an oath to the state constitution because they are elected to propose its revision but they should take an oath to the Constitution of the United States, and swear to perform faithfully their duties as delegates.<sup>30</sup> They are not constitutional officers. The number and size of committees vary; in recent conventions the number has varied from sixteen to thirty and their size from three to twenty.

A convention follows legislative procedure. Articles or sections of the constitution are assigned to committees for study and report. The committees usually hold preliminary public hearings in which the advocates or opponents of various changes are heard and then in executive session decide upon their recommendation to the convention. The work proceeds by means of a calendar with hearings of the committees in the committee of the whole prior to the action of the convention.

5. *The Powers of a Convention.* There are three theories as to the powers of a convention: (1) that they are under legislative control; (2) that they are sovereign bodies representing the people in their original capacity; (3) that they are coördinate bodies with the legislatures and are equally bound by the state constitutions and statutes.<sup>31</sup> While there are both practice and judicial precedents supporting the first two theories, the third theory seems to have the weight of opinion on its side.<sup>32</sup> If the legislature enacts restrictions under constitutional grant, the courts will enforce them. Moreover, the convention cannot abolish the existing organs or agents of state government or assume their powers. It is, however, the sole judge of its membership; may expel its members and provide for the filling of vacancies; rent buildings for its use; purchase supplies; employ help; exercise all the powers incident

<sup>30</sup> Hoar, *op. cit.*, 187-190.

<sup>31</sup> Dodd, *op. cit.*, 72-117.

<sup>32</sup> Holcombe, *op. cit.*, 126-1



to its business; and pledge the faith of the state, and perhaps its credit, for its legitimate expenses.<sup>33</sup>

6. *The Methods of Submitting Its Work.* The primary function of a convention is to draft a new constitution or to frame amendments for submission to the voters for approval or rejection, but unless restrained by local precedent, statute, or custom it may not only frame but adopt a constitution or amendments without the use of a referendum. Indeed, since its origin it has resorted to this practice in several instances. Sixteen states, therefore, require that the action of their conventions be submitted to a referendum, and as a matter of practice this is generally done.

These methods of submission have been followed: (1) the constitution as a whole, (2) the essential parts as a unit and the controverted parts as separate amendments, and (3) a series of amendments.<sup>34</sup> The third method seems to have secured the best results.<sup>35</sup> It prevents the work of the convention from coming to naught by a defeat of the entire revision as a result of some unsatisfactory provisions. The submission may take place at either a general or a special election.<sup>36</sup> If the proposed changes are fundamental, it would seem that a special election would be more desirable.<sup>37</sup> Any method of presenting the work of the convention for ratification places a heavy burden upon the voter and should always be accompanied by an educational campaign.

<sup>33</sup> Hoar, *op. cit.*, 170-184.

<sup>34</sup> Twenty-nine states require that each amendment be presented separately.

<sup>35</sup> Massachusetts, Nebraska, and Ohio used this method.

<sup>36</sup> A general election is required by twenty-five states.

<sup>37</sup> Hoar, *op. cit.*, 193-213.

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## CHAPTER XXXI

### POLITICAL PARTIES IN THE STATES

#### I. THE RELATION OF THE PARTY SYSTEM TO THE STATES

The federal system prevailing in the United States has given rise to several conditions affecting the nature and organization of political parties. First, by allowing each state to maintain a distinct government, it has encouraged the appearance and continued activity of local parties, contesting for the control of such government. The large number of elective offices to be found in the states has made them hotbeds of political contention because of the efforts of various groups to secure and hold such offices and otherwise to exert a prevailing influence in public affairs. Second, the existence of national and state parties side by side has sometimes resulted in subordinating local welfare to national party solidarity, in the confusion of local and national issues, and in the domination of state party organization by national party leaders. While the nationalizing influence of parties is to be commended,<sup>1</sup> it can be carried too far. This would appear to be the case when matters of local concern are obscured in the more dramatic contest between the national parties and when the state organization—which, as we have seen, is an integral basis of the national organization—becomes merely an instrument in the hands of outsiders, its possibilities for expressing and effecting the will of the state electorate on matters vitally affecting their welfare being overlooked.<sup>2</sup> Third, by leaving to the states the general regulation of the suffrage and elections—with a limited number of exceptions imposed by the national Constitution—<sup>3</sup> federalism has given them the authority to control practically all the operations of political parties. State laws have, in effect, assimilated political parties, originally spontaneous in creation and extra-constitutional in na-

<sup>1</sup> Cf. Ch. IX.

<sup>2</sup> A. N. Holcombe, *State Government in the United States* (Revised Ed., 1926), 185-188.

<sup>3</sup> Cf. Ch. VIII.

ture, to the government; they have thus become an intimate part of the legal machinery of the states.

## II. PARTY ORGANIZATION IN THE STATES

Party machinery within the states consists of committees, conventions, and primaries. As has been pointed out in connection with the organization of national parties,<sup>4</sup> the committee system constitutes the permanent means for carrying on the work of the parties. At the head of the system is the state central committee, consisting of members from various subdivisions of the state, who may be elected by local conventions or direct primaries. The committee is directed in its work by a chairman, who may be a mere figurehead and obey the orders of some local national boss. It has other officers, including a secretary, a treasurer, an executive staff, and others, differing from state to state. While the nominating convention existed in the states, the central committee wielded considerable power; but now its authority is relatively limited. It is chiefly concerned with the conduct of elections, the raising of funds, the healing of quarrels within the party ranks, and the nomination of candidates to fill vacancies in state offices. During the national elections, it coöperates with the national committee in an effort to carry the state for its party. Aiding the central committee is a number of subordinate committees to be found in the various judicial, representative, and administrative districts, and in the counties, cities, towns, wards, and precincts. They cover the state like a network and carry party activities into every village and voting place. Their powers are distributed territorially and are exercised to some extent under the direction of the central organization. Their energy depends to a large extent upon the amount of rivalry existing in the state between the various parties; it is conditioned upon the briskness with which offices are contested. Their composition is determined by state law, as are also their functions.<sup>5</sup>

The delegate convention appeared as a unit in local party machinery as early as 1804, when the Republicans in New Jersey organized to control the state government by uniting on nominees to be submitted to the electorate. The rising tide of democracy

<sup>4</sup> Cf. Ch. X.

<sup>5</sup> There are, however, some exceptions. In the few states where nominating conventions still prevail, and largely in the South, parties are still mainly voluntary associations. Edward M. Sait, *American Parties and Elections* (1927), 313-316.

swept away the legislative caucus, which had been dominated too often by a few corrupt and self-seeking individuals, and cleared the ground for the establishment of nominating conventions in the remaining states. The state conventions rested ultimately on the local caucus, composed theoretically of the voters of a given town, ward, or city, who elected delegates to county or district conventions, the latter in turn naming representatives to the state meetings. A complete hierarchy of conventions was developed, covering the state and interlocking with the national convention. The duties performed were the registration of the popular will through the making of nominations and the drafting of the party platform. The work undertaken was relatively simple; the organization rested on a seemingly democratic basis; it appeared that the ideal system for registering the choice of the party at large was at hand. However, the same corruption which had made the legislative caucus obnoxious reappeared—the truth was, the conventions, local and state, soon found themselves captured by the worst elements in the state. The popular caucuses were frequently dominated by “repeaters” and “floaters.” Delegates sold their seats to unscrupulous politicians, who acted as their substitutes or “proxies.” Factions which were defeated in the primaries sent contesting delegations to the conventions and were often admitted by a friendly chairman, who appointed a credentials committee to do his bidding. Fraud and disorder prevailed. The convention became a mere instrument in the hands of party bosses. An extreme case was presented by the Cook County (Illinois) convention of 1896. Its composition has been described as follows:

Of the delegates, those who had been on trial for murder numbered 17; sentenced to the penitentiary for murder or manslaughter and served sentence, 7; served terms in the penitentiary for burglary, 36; served terms in the penitentiary for picking pockets, 2; served terms in the penitentiary for arson, 1; ex-Bridewell and jailbirds identified by detectives, 84; keepers of gambling houses, 7; keepers of houses of ill fame, 2; convicted of mayhem, 3; ex-prize fighters, 11; pool-room proprietors, 2; saloon keepers, 265; lawyers, 14; physicians, 3; grain dealers, 2; political employees, 148; hatter, 1; stationer, 1; contractors, 4; grocer, 1; sign painter, 1; plumbers, 4; butcher, 1; ex-policemen, 15; dentist, 1; speculators, 2; justices of the peace, 3; ex-constable, 1; farmers, 6; undertakers, 3; no occupation, 71. Total delegates, 723.<sup>9</sup>

<sup>9</sup> R. M. Easley, “The Sine-qua-Non of Caucus Reform,” 16 *Review of Reviews*, 322-324 (1897).



With such possibilities for perverting the will of the masses of voters, there was ample reason for reaction against such a system. Governor Hughes, of New York, carefully summarized his reasons for opposing the continued existence of the state convention, as follows:

(1) It has a disastrous result upon party leadership. The power of nominating candidates, which has come to rest largely upon party leaders, is so important that it offers a constant temptation to the manipulation of party machinery for its preservation in the hands of individuals. (2) It tends to discourage party voters from participating in the affairs of the party. The average voter is an infrequent attendant at party caucuses and primaries. The present indirect system of nominating candidates has convinced the average citizen of the futility of any contest in the primaries, and only a small percentage of the enrolled voters go through the motions of voting for delegates already selected for them by the leaders. The primary vote for delegates to conventions is largely cast by those who make more or less of a profession of politics. . . . (3) Candidates too often regard themselves as primarily accountable not to their constituents, nor even in the broad sense to their party, but to those individual leaders to whom they realize they owe their offices, and upon the continuance of whose favor they feel that their political future depends. (4) To the extent that party machinery can be dominated by the few, the opportunity for special interests which desire to control the administration of the government, to shape the laws, to prevent the passage of laws, or to break the laws with impunity, is increased. These interests are ever at work, stealthily and persistently endeavoring to pervert the government to the service of their own ends. All that is worst in our public life finds its readiest means of access to power through the control of the nominating machinery of parties.<sup>7</sup>

While numerous reforms have been proposed and a few adopted,<sup>8</sup> the convention system in the states has largely been displaced by other devices. It stands unshaken in Connecticut, New Mexico, and Rhode Island; and is used in Utah in only first and second class cities. Under provisions allowing parties the option of using primaries or conventions for nominating their candidates, the older practice survives in a chaotic form.<sup>9</sup> Fourteen states utilize the convention to frame party platforms; other miscellaneous duties are assigned to it. But as an institution it has been swept aside by the direct primary.

<sup>7</sup> 91 *Outlook*, 91 (1909).

<sup>8</sup> Cf. P. Orman Ray, *An Introduction to Political Parties and Practical Politics* (3rd Ed., 1924), 77-80.

<sup>9</sup> Sait, *op. cit.*, 280-281.

## III. THE DEVELOPMENT AND OPERATION OF THE PRIMARY

As early as 1868 the local rules of the Republican party of Crawford County, Pennsylvania, abolished the delegate convention and provided that candidates should be nominated at the primary. With this beginning, the new system rapidly extended to the West, where it was applied in varying forms. The southern states welcomed it as a means of overcoming the influence of the negro in politics. By party rules, only white voters were allowed to participate in the Democratic primaries, and the Democratic party dominated the elections. The system, however, remained optional and largely unregulated until 1904 when mandatory laws for its control were adopted in Wisconsin and Oregon. The permanent establishment of the primary must be credited to the efforts of Robert M. La Follette, who, as Governor of Wisconsin, secured the passage of legislation minutely regulating the entire pre-election and nominating process. The success of the plan, which appeared to bring the control of government directly into the hands of the people, who not only should elect, but now could nominate, their candidates, led to wide copying of the provisions found in Wisconsin and Oregon. Today the direct primary is found in forty-four states. It is nothing more than a means for nominating candidates by the voters of the party directly, rather than indirectly through conventions. It varies from state to state in form. In five states its use is optional with the party committees; in several others, it is optional with respect to local offices but not to state offices. Again, in five states it is used to nominate all candidates except those for the United States Senate, these being named by delegate conventions. In Iowa, nominations are regularly made at primaries but when the vote of the highest candidate falls below thirty-five per cent of the total vote cast for the office, the nomination may then be made by convention. In the vast majority of states, however, the primary applies to the nomination of practically all national, state, and local officials.<sup>10</sup>

As a general rule the state laws provide that only parties which have attained a certain voting strength in the last preceding election may or need hold primaries to select their candidates. This may be fixed upon a percentage basis: thus it is one per cent of the votes cast in Maine and thirty per cent in Florida. Or it may

<sup>10</sup> *Ibid.*, 279-280; for the history and analysis of the primary, see C. E. Merriam and Louise Overacker, *Primary Elections* (1928), *passim*.

be determined by a flat number, as 25,000 voters in New York and 100,000 in Texas. The laws also fix the time and place of the primaries, the general practice being to hold those of all the parties on the same day some time prior to the general election, with the regular election officers presiding. The secret, or Australian, ballot is used, the common practice being to have a separate ballot for each party, which is printed at public expense. Names of candidates are arranged in columns corresponding to the respective offices, and are placed in alphabetical order, or in such order as is determined by lot or by rotating the position by dividing the ballots into separate lots and allowing the candidate's name to appear in a different order in each group. To secure a place on the ballot, the candidate must file a petition bearing the signatures of a certain percentage or a definite set number of voters, a provision which gives rise to some irregularity and even fraud on the part of candidates and their representatives. The vote required to nominate is generally a mere plurality; but five southern states require a majority, necessitating a second, or "run-off," primary between the two highest candidates on the list when no person has obtained a majority of the vote cast. With a few notable exceptions only regular party members may participate in the party primaries. In Wisconsin, Colorado, and Montana, however, the primaries are "open"; the members of any political group may vote in them, an arrangement which preserves the secrecy of the voter's party affiliation and encourages independent voting but which also enables opponents to raid the primaries and break down party strength. The latter possibilities have led most states to adopt the "closed" primary as a means of insuring strict party regularity. In ten states the tests which are applied are set by the parties themselves; in the remaining states employing the "closed" primary the tests are determined by law. In either event the purpose is to prevent outsiders from participating. The test may be based on present, past, or future affiliation, or a combination of these. It may be applied prior to the primary as is done in some nineteen states, which allow the voter to indicate his party preference when he registers as a voter. It may be applied under the so-called "challenge" system at the polls. In the latter case, the voter may be challenged when he asks for a party ballot and made to swear that he is a member of the party, and may be required to declare that he will support the party nominees in the general election.<sup>11</sup>

<sup>11</sup> Cf. Ray, *op. cit.*, 81-88.

## IV. THE RELATIVE MERITS OF THE PRIMARY

Much can be said for and against the system of direct primaries employed at the present time. The chief arguments advanced in favor of the retention of the system are (1) that it diminishes the control exercised over the party by machines and bosses in that it diffuses party leadership and gives the rank and file more influence, (2) that it gives the voters the first and last word in the electoral process, and (3) that it eliminates the unfair bargains made by conventions behind closed doors to the detriment of the interests of the party at large. In spite of these and other advantages, the primary has presented some serious defects in actual operation. For one thing, the cost is enormous. It has been estimated that the California primary of 1922 cost the state \$570,000, or seventy cents per vote. Candidates are obliged to spend fabulous amounts canvassing their territory, a practice which has often given rise to scandals and which state regulation has not eliminated. Again, the primary fails to bring able men to the top; it is true as a general rule that the men offering themselves as candidates possess less ability than formerly was the case. Men of wide experience and personal dignity often rebel at the idea of "stumping" a state or district in pursuit of votes, especially since appeals must be made on the most spurious grounds to arouse the voters at large to favorable action. Furthermore, it is claimed that the direct primary has broken down party responsibility by shifting it from a definitely ascertainable group in the convention to that vague and indeterminable something called "the electorate." Moreover, the burden of the voter has been increased in that he is now required to do the work performed previously by the convention. He rarely finds himself able to study the qualifications of the several aspirants for each local, district, and state office; he must usually depend on his friends or his newspapers for advice, and too often they are incompetent to give it, or are controlled by the machine, which the primary aims to break up. Finally, it is said that the primary offers no means of compromise between different points of view within the party. The party members must vote yes or no on the candidates and issues presented. For very practical reasons, the electorate can make only broad and general decisions. The advantage of technical aid and advice afforded by the representative convention system, it is claimed, has been bargained away for the nominal right of the people to discharge functions



which are exceedingly difficult, if not entirely impossible, for them to do. At best, the primary serves as a weapon in the hands of the people to be used in extreme cases against the oligarchy which normally controls the party.<sup>12</sup>

In spite of such limitations, there is little likelihood that the primary will be abandoned. The people feel that it is a safeguard to which they are entitled; they believe that it serves the ends of popular government by giving them direct participation in the nominating process, which in many states amounts to an election, in that one or other of the parties predominates to such an extent that the general election becomes a mere formality. Conventions have been restored in New York and Idaho for the more important offices, but the other states—including Montana and Nebraska—have recently refused to surrender the primary system. Progress appears to depend rather on improving the present methods.

#### V. REFORM OF THE PRIMARY

Among the reforms proposed and employed should be mentioned the non-partisan primary, which has found its place in states and localities for the nomination of various types of officials. The purpose is to eliminate the influence of national parties in purely state and local affairs, and to overcome the evils commonly associated with the idea of partisanship. Today more than thirty states allow nominations of certain classes of officials to be made without reference to the party affiliation of the candidates. Thus, the judges of state and local courts in some states, a few administrative officials, the members of the legislatures of two or three states, and numerous local officials are nominated by this means. While usually held on the same day as party primaries, the non-partisan primaries employ separate ballots which bear no party designations. Names of candidates are placed on the non-partisan ballots by means of petitions, which must contain no reference to party affiliation. Voters are obliged, of course, to take no party tests, as is the case in the regular primaries. The two candidates receiving the highest number of votes for each office are entered in the general election, where party designations are again omitted. Thus, as Professor Holcombe has said, "The non-partisan primary system is in effect a *majority* electoral system, under which the voter has two votes, a first-choice vote expressed in the primary, and a second-choice vote expressed at the ensuing general election.

<sup>12</sup> Cf. Sait, *op. cit.*, 416-427.

In case the voter's first choice is one of the two leading candidates, at the primary, his second choice can be cast and counted for him again at the final election. Otherwise he is free to make a second choice between the two candidates most generally preferred at the primary."<sup>13</sup> This device has had the result to some extent of eliminating national party influences in state and local affairs. But this result has by no means been general. In a number of cases, the machine leaders have continued to control. The fact that party designations are omitted from the ballot does not mean that the candidates will not depend on the support of their party followers. Often the result of the new system is merely to eliminate the weak candidates in the first primary and insure the success of the majority choice in the second election.<sup>14</sup>

Another proposed reform looks toward the relief of the voter from the serious burden imposed by the long ballot. In the primaries, as in the general elections, there is great need of bringing the work to be accomplished by the electorate into accord with political realities. It is absurd to expect intelligent action by the mass of citizens upon the many questions which are now submitted to them. The average voter has neither the time, the ability, nor the disposition to study carefully the qualifications of hundreds of candidates, seeking all offices from constable to governor. Circumstances compel him merely to go through the motion of registering his choice, without the exercise of discretion. If popular government means anything at all, it means that the people exercise an intelligent will. It is clear that this can be done most effectively by the states adopting the same plan used with great success by the national government—the election of a small number of important officials, and the appointment of the remaining under civil service rules. This would make the ballot count; it would certainly tend to eliminate the confusion which prevails under the present direct system of nominations.<sup>15</sup>

Pre-primary recommending conventions have also been proposed for the purpose of overcoming a recognized shortcoming of the primary. This plan seeks to have party committeemen chosen at the preceding election to name the ticket, which would then be submitted to the membership as a whole. If any large number of the party objected to such nominations, they could circulate peti-

<sup>13</sup> *Op. cit.*, 204.

<sup>14</sup> Cf. R. E. Cushman, "Non-partisan Nominations and Elections," 106 *Annals*, 83-86 (1923).

<sup>15</sup> Richard S. Childs, *Short-Ballot Principles* (1911), *passim*.

tions and, by securing the required number of signatures, have their own candidates enrolled on the primary ballot. The party members then could select the candidates they chose. This scheme, advocated strongly by Governor Hughes of New York some years ago, is said to have the advantage of preserving the party organization while allowing the members of the party to repudiate, as well as to ratify, the organization nominees. It would also reduce the number of contests in the primary, and might eventually lead to the use of the primary only in exceptional cases, as a gun behind the door, to insure that the will of the party at large prevail.<sup>16</sup>

An extreme change has been suggested to the effect that nominations should be by petition rather than by primaries. This would involve abandoning the primaries altogether. It has been adopted in Boston, where any voter may become a candidate for the office of mayor by filing nomination papers with 5,000 signatures and for membership in the city council or on school committees by securing 2,500 signatures. Thus every large group in the city may put forth its candidates. Even this plan, however, has developed some serious defects. There is much waste of time and effort in securing the required signatures; also party caucuses are held and these become the real nominating agencies. To overcome such drawbacks, it has been proposed that a system similar to that found in England be adopted, where candidates for Parliament need only prepare a nominating petition in writing signed by a proposer, a seconder, and eight others. Also provision is made for the candidate's depositing from five hundred to a thousand pounds as a forfeit. If he receives at least one-eighth of the votes cast, his money is returned; otherwise, he loses it. The objection to applying such a measure in the United States is that it limits political opportunity by the large sums which must be deposited. A modified plan of this type commends itself as a possible improvement on existing arrangements.<sup>17</sup>

The central problem after all is that of making the party organization responsive and responsible to the party membership. It has already been shown that organization is essential to the very existence of parties; that there must be leadership, concentrated in the hands of a few persons.<sup>18</sup> Unfortunately, within certain states and municipalities, the management of party has fallen under the

<sup>16</sup> Charles E. Hughes, "The Fate of the Direct Primary," 10 *Nat'l. Mun. Rev.*, 23-31 (1921).

<sup>17</sup> Robert C. Brooks, *Political Parties and Electoral Problems* (1923), 266-268.

<sup>18</sup> Cf. Ch. X.

control of individuals and cliques who have used their power to serve their own ends. This condition was so prevalent during the nineties that James Bryce was led to declare that the government of our boss-ridden cities was the one conspicuous failure of American democracy. Hardly a city of any size has been spared the disgrace of machine and ring rule, a condition which has been ascribed to the existence of the spoils system, the opportunities for illicit gains arising from the possession of office, the presence of a mass of ignorant and pliable voters, and the insufficient participation in politics of the "good citizens."<sup>19</sup> The abuses of the Tweed ring in New York and the gas ring in Philadelphia—not to mention the "racketeers" and "bootlegging" gangs in Chicago and other cities today—are significant evidences of the depths to which popular government may be plunged by the domination of corrupt and cowardly forces in the parties which run the government.<sup>20</sup> The boss exists as the nexus of municipal administration, who, although entirely outside the constitutional structure of the government and holding no office, by reason of his aggressiveness and unscrupulousness, draws into his hands the scattered political power, overcomes the checks and balances under which government in this country is supposed to function, and, entirely unaccountable politically for his acts, serves effectively as a virtual dictator.<sup>21</sup> The same may be said of the state boss. The result of this system was graphically explained by Elihu Root, in speaking of conditions existing in New York in 1915:

What is the government of this state? What has it been during the forty years of my acquaintance with it? The government of the constitution? Oh, no; not half the time, nor half way. . . . From the days of Fenton, and Conkling, and Arthur, and Cornell, and Platt, from the days of David B. Hill, down to the present time, the government of the state has presented two different lines of activity, one of the constitution and the statutory offices of the state, and the other of the party leaders—they call them party bosses, they call the system—I do not coin the phrase, I adopt it because it carries its own meaning—they call the system "invisible government." For I do not remember how many years Mr. Conkling was the supreme ruler of this state. . . . Then Mr. Platt ruled the state; for nigh upon twenty

<sup>19</sup> *American Commonwealth* (New and Rev. Ed., 1922), II, 124.

<sup>20</sup> *Ibid.*, II, 82-145, 379-425. See also Lincoln Steffens, *Shame of the Cities* (1904) and Gustavus Myers, *The History of Tammany Hall* (New Ed., 1917).

<sup>21</sup> H. J. Ford, *The Rise and Growth of American Politics* (1898), 301-302.



years he ruled it. It was not the legislature; it was not any elected officers; it was Mr. Platt. And the capital was not here; it was at 49 Broadway; with Mr. Platt and his lieutenants. It makes no difference what name you give, whether you call it Fenton or Cornell or Arthur or Platt, or by names of men now living. The ruler of the state during the greater part of the forty years of my acquaintance with the state government has not been any man authorized by the constitution or by the law; and, sir, there is throughout the length and breadth of this state a deep and sullen and long-continued resentment at being governed by men not of the people's choosing. The party leader is elected by no one, accountable to no one, removable by no one.<sup>22</sup>

No single remedy can be proposed for situations of this kind. Doubtless the direct primary exists as a weapon to be employed when a general house-cleaning is required in the government to rid it of officers subservient to boss control. But its effectiveness depends on the alertness of the public, which may be inclined to suffer inconveniences not directly felt rather than to take the trouble to exert itself in behalf of better government. To some extent, the primary has broken machine domination by multiplying the units which must be brought under control. Previously the boss had the convention alone to control; now he must confront numerous smaller leaders over the state, who, in turn, must confront other leaders, making unity of command somewhat more difficult. Again, the reorganization of city and state government by introducing commission or manager plans, or consolidating the administration into the hands of fewer individuals, who are made responsible, offers much hope toward settling the problem. The abolition of the spoils system, still rampant in most cities and states, and the introduction of merit principles would do much to eliminate the graft without which bosses and machines cannot exist. The appearance of numerous voluntary associations determined to keep watch over the government and to prevent so far as possible the recurrence of abuses is a hopeful indication. There are signs of an awakening public conscience which will not allow corruption in high places to go unchallenged. Upon the spirit of an awakened and enlightened citizenship more than upon mechanical devices depends the elimination of the evils which exist. Eternal vigilance remains the price of liberty and good government. Democracy is not a matter of devices. It is a state of society and its issues must be settled by freedom of discussion and action of its members.

<sup>22</sup> *Addresses on Government and Citizenship* (1916), 201-202.

## VI. THE CONTROL OF CAMPAIGN FUNDS

Besides regulating the nomination process, which, as has been seen, centers around the direct primary, the various states also determine the conditions under which campaigns are conducted and minutely control the machinery of elections. The chief concern of the states with respect to campaigns has been to limit unfair collection and disbursements of funds for individual or party purposes. Legislation aiming at this end, while found extensively among the states, is not uniform in character. Generally speaking, however, the legislation, which began with the New York statute of 1890, has been modeled on the English Corrupt and Illegal Practices Act of 1883, which limits the aggregate expenditures, determines the objects of legal expenditure, and requires sworn statements as to the amounts actually spent. The general features of such legislation may be summarized as follows: (1) It requires candidates or their representatives, or both, to file a sworn itemized statement of receipts and disbursements at a specified time or times before and after the election. (2) It fixes definite limitations upon the amounts which may be expended by the candidates for the various offices or types of offices, smaller amounts being allowed for the local candidates and greater sums for those seeking state and national office. (3) It defines legal expenditures by indicating the purposes for which money can be used, such as the payment of rent for offices and halls; the purchase of stationery, postal services, printed matter, advertising; the hiring of speakers, clerical assistants, and campaign managers; in fact, expenditures for all reasonably and fairly necessary means to conduct a political campaign. (4) It contains various miscellaneous provisions, such as requiring that the newspaper and periodical space bought and used by the candidates shall be labeled "paid advertisement" or "political advertisement"; that newspapers and periodicals may not solicit or receive compensation in return for political influence; and that candidates may not promote their interests by a promise, directly or indirectly, of appointing their supporters, or any of them, to office. Corporations are commonly forbidden to contribute to political campaigns; also some states forbid the assessment of public employees for political purposes. Though such legislation is not always obeyed—falsified statements as to collections and expenditures for political purposes being made at times and the provisions against the contributions

of corporations being evaded by the officers of corporations often contributing funds as individuals—there can be little doubt that a beginning has been made in the right direction. There is much need, however, for a revision of the various statutes and for stricter enforcement.<sup>23</sup>

## VII. THE REGISTRATION OF VOTERS

State legislation of a slightly different character exists to insure, so far as possible, the purity of the election process. Among such laws should be mentioned the requirements for registration of voters prior to the election, made necessary by the numerous frauds arising in cities where voting lists were formerly prepared by selectmen, poll-tax collectors, or other local agencies. The lists of voters were often padded; the names of dead men were frequently allowed to remain on them, inviting impersonation; repeating was common. As early as 1866 New York and California attacked this problem by requiring the voter to appear personally in advance of the election and give satisfactory evidence to a board of registrars that he possesses legal qualifications for voting before he is enrolled. Such requirements are found in over forty states, with numerous local variations, and have achieved the result of largely rescuing the voting privilege from the abuse of corrupt and irregular practices.<sup>24</sup> Very similar in purpose and effect are the provisions of state laws dealing with election frauds. With advancing time, these have become more elaborate and detailed until today they cover almost every possible abuse. Thus they forbid election betting, the pledging of votes for any consideration whatever, repeating, impersonation, engaging in riots at elections, intimidating voters, carrying arms at elections, illegally arresting voters, and the like.<sup>25</sup>

## VIII. THE CONDUCT OF ELECTIONS

The actual holding of the elections is also carefully and fully regulated in the several states. As a general rule the arrangements for the election—the designation of polling places, the printing of ballots, the appointment of election officials, the provision of supplies, and other related duties—are looked after by local boards,

<sup>23</sup> Cf. Sait, *op. cit.*, 516-526.

<sup>24</sup> Cf. Helen M. Rocca, *Registration Laws* (1925), 3-5.

<sup>25</sup> The election laws of each state must be consulted for the exact provisions relating to elections.

usually county commissioners or special election boards, though a single commissioner may be placed in charge. The officers actually in charge of elections are usually appointed on a bipartisan basis. These are found in each election precinct, and generally consist of three inspectors or judges, being assisted by ballot clerks or poll clerks. Parties and individual candidates are entitled to appoint challengers or watchers to inspect the election process to see that there is no illegal voting. The election officials are charged with conducting the election in an orderly and legal manner. This involves passing upon the qualifications of voters, applying the tests required by law, assisting voters unable to mark their ballots, and acting as custodians of the ballot boxes. Their work is of the utmost importance, and too often unfit and even malicious individuals are employed, opening the way for corruption—to ballot box stuffing, to repeating, and to the other evils associated with unfair elections—and to incompetence and gross errors in the final counts. Common sense dictates that improvements be made, a result which might conceivably be brought about by placing a single, well-paid person in charge and allowing him to serve during good behavior without reason to favor any party or group. Further improvement would result by relieving the polling officials of the duty, now too generally imposed on them, of counting the ballots. This step has been taken by some states and municipalities by creating double election boards, one part of which performs the work already described and the other, usually arriving some hours after the polls have opened, counts and tabulates the votes. Some twelve states have adopted this plan, finding that it aids in relieving errors resulting from fatigue and haste of the single board but also finding that it is often difficult to secure the proper men to do the required work.

#### IX. CANVASSING ELECTION RETURNS

After the ballots are counted, the law requires that the returns be canvassed. This is done by local boards—aldermen, election commissioners, county commissioners' courts, and similar bodies—who officially review the results of the election and report their findings to some state official, usually the secretary of state. The returns are then canvassed by a state board, often composed of the Governor and a limited number of other state officers. After the canvassing bodies have filed their reports with the proper local, district, and state officers, the latter forthwith issue certificates



of election to those who have been declared elected.<sup>26</sup> The election certificate amounts to the same as a commission to an appointed officer.

## X. BALLOT REGULATION

Another important matter which has become the subject of extensive regulation is the ballot. Early methods of voting let down the bars to numerous evils. There was no official ballot; it was printed and distributed by party candidates or committees and handed to the voter before he went to the polls. No secrecy existed, and intimidation was quite common. Also floating, repeating, impersonation, and general disorder existed. In 1888 the first important step to reform these conditions was taken when Kentucky adopted the so-called Australian ballot—a device which was adopted by the Canadian Province of Victoria in 1856—for municipal elections in Louisville. This plan has gained favor in the United States until today only South Carolina remains without having established it in one of its varying forms. The general principles upon which the new system rests are, first, secrecy, the ballot being marked in the polling booth, folded, and deposited in the box by the voter alone; second, printing at public cost by public authority; third, the listing of the names of all candidates rather than those merely of one party; fourth, distribution by only election officials. There are two general types of the ballot—the office group type and the party column type. The former, the so-called Massachusetts ballot, has the names of all candidates for an office grouped under the title of such office. To vote a straight party ticket it is therefore necessary to go through the entire ballot and check each name to be endorsed. This is said to promote independent voting, in that the candidates thus are obliged to stand on their own merits to a greater extent than if the voter could select the entire party slate with one mark. This type of ballot is found in thirteen states. A slight variation, found in three states, while retaining the office columns facilitates straight party voting by introducing an extra column, containing the names and symbols of parties, with squares or circles opposite. The voter, by placing a mark in the space thus provided, may vote for all the nominees of his party in one operation. The independent voter, however, is obliged to go to greater trouble, sometimes being required to mark the name of each candidate voted for; but in some states being allowed to check the party column and the individual names of

<sup>26</sup> Cf. Ray, *op. cit.*, 256-270.

candidates of other parties, thus voting for all nominees of his party except those specifically marked. The second kind of ballot—the party-column type—is found in twenty-six states. As its name indicates, the names of candidates are arranged according to party affiliation rather than according to the office sought. About half of the states which employ this so-called Indiana ballot place at the top of each column the party name and circle, as well as the party emblem. A straight ticket is voted by putting a cross in the party circle or in the square opposite each name in the column. A split ticket is voted by placing a cross opposite the names of the individual candidates supported, thus voting for all candidates of the party except those of other parties thus marked. The Texas ballot differs from others in this general classification because it has no party circle but requires a line to be drawn through the names of all candidates voted against. Four states have adopted a further variation of the party-column ballot by providing no party circle and requiring the voter to place a mark opposite the name of each candidate favored.<sup>27</sup>

The difficulty of preventing irregularities in the use of the Australian ballot, which can be manipulated no matter what the safeguards may be, has led twenty-four states to authorize the use of voting machines. These are devices with complicated mechanisms which automatically record the votes of all who are legally allowed to operate them. As the voter enters the polling booth he sees on the face of the machine a large ballot containing the names of the candidates. A lever is suspended above the name of each candidate; by pulling it down an affirmative choice is registered for such person. Levers also may be provided to register straight party votes. The machine is unlocked when the voter enters the booth and closes the curtains behind him. He may change his vote at any time before he leaves; for the machine is locked only after the curtains are drawn back. An interlocking device prevents voting twice for the same office. This avoids defective ballots. The machine counts the votes automatically as they are cast; at the end of the election the inspectors merely need to unlock the counter compartments and tabulate the result. The machine is valuable because it saves the voter's time, decreases the costs of elections, and eliminates much printing and numerous counters of votes. It has been used with much success in certain larger cities—especially in New York. The chief disadvantages experienced in connection

<sup>27</sup> Cf. E. C. Evans, *A History of the Australian Ballot System in the United States* (1917), *passim*.

with the machines is that their initial cost is great—some \$1,000 for each; the less populous communities find their installation impossible; the machines may become obsolete by the change of election laws. The chief reasons for the failure of their wide adoption, however, seem to be the inertia and prejudice of the electorate.<sup>28</sup>

Another variation of the Australian system has been introduced in recent years by forty-six states, providing for the voting of such persons as are not at their legal residence on election day. The first absentee voting law was passed by Vermont in 1896 but the plan did not find general acceptance until after 1913. Our entrance into the war gave an impetus to this reform, owing to the necessity of providing some means for enlisted men to cast their ballots while away from home. In general there are two schemes followed. The Kansas plan, adopted by nine states, provides that a voter who is absent from his voting-place on election day may go to the polls where he happens to be and make an affidavit to the effect that because of his business or occupation he is required to be absent from his regular voting district and that he has not voted elsewhere. He is then given a ballot, enters the booth, marks his ticket, hands it duly folded to the election official, who sends it by mail to the proper official in the voter's own district, where it is counted. Voting is thus restricted to state officers unless names of local candidates are inserted. Again, the identity of the voter is known to those who make the count. Somewhat different is the North Dakota plan found in thirty-three states. The voter who expects to be absent from his county on election day may apply to a designated county official at a certain time (usually thirty days) *before* the election. He marks his ballot some time before election day in the presence of a notary public, subscribing to the affidavit on the back of the official envelope to the effect that he is a qualified voter and will have no opportunity of casting his ballot in person. The ballot is then returned to his county, where his signature on the affidavit is compared with the one on file in the office where he secured the ballot. If there is nothing irregular or defective about the ballot, it is deposited along with the rest, without being unfolded. Secrecy is thus observed and the voter is given the advantage of using a ballot containing the names of all candidates in whom he is interested. Numerous variations of these laws are found throughout the country, some being more

<sup>28</sup> Cf. T. David Zukerman, "The Voting Machine Extends Its Territory," 21 *Am. Pol. Sci. Rev.*, 603-610 (1927).

restrictive and some more liberal in terms. The central idea of all of them, however, is to allow the person away from home to register his choice before he leaves or after he is gone—in other words, to prevent his losing his vote simply because he happens not to be in his voting precinct on election day. As yet the percentage of voters taking advantage of this device has not been large, because of a lack of familiarity with its workings and the trouble involved.<sup>29</sup>

## XI. INCREASING POPULAR CONTROL

The fact that the methods of voting generally employed often lead to the election of candidates by bare pluralities has led some states and municipalities to adopt schemes to overcome this limitation and insure a greater functioning of the majority principle. Such plans have taken several different forms. For example, the members of the lower branch of the legislature of Illinois are elected on the cumulative voting plan under which the voter is given three votes, which he may concentrate on one candidate or distribute among two or three. This enables the minority party to secure a representative in the legislature by its members agreeing in advance on their candidate and concentrating their votes upon him.<sup>30</sup> Preferential voting is another system aimed at securing elections by the majority. It is found extensively in the cities, and two states—Alabama and Florida—have adopted it for their primaries. It appeared first in Grand Junction, Colorado, about 1909 and is now found in some seventy cities. There are two major variations of the scheme—the Bucklin plan and the Ware plan. Under the former the voter is allowed to indicate his first, second, and third choices for each set of candidates. The candidate of each group seeking the same office who receives a majority of first choices is immediately elected. If no candidate secures such a majority, the first and second choice votes of each candidate are added and the one is elected who then secures a majority of all such votes. Finally if no one receives a majority, the first, second, and third choice votes of each candidate are added and the one receiving the *highest* vote is elected. The Ware plan provides that if no candidate has a majority of first-choice votes, the one having the smallest number of first-count votes is

<sup>29</sup> Cf. Brooks, *op. cit.*, 413-418; Ray, *op. cit.*, 280-287.

<sup>30</sup> Cf. B. F. Moore, "The History of Cumulative Voting and Minority Representation in Illinois, 1870-1919," *University of Illinois Studies in the Social Sciences*, VIII, No. 2 (2nd Ed., 1919).



eliminated and the second choices of these ballots are distributed among the remaining candidates, a process which continues until one candidate receives a majority of the votes cast for the office. Preferential voting has the merit of promoting majority choices, of simplifying the election process and eliminating unnecessary expense, and of giving the voter a wider range of choices among those seeking office. Its chief shortcoming seems to be that often the voters fail to register any but their first choices, thus throwing the other two away.<sup>31</sup> A more elaborate plan, which has found favor in a number of American cities, is proportional representation. It may be used when several persons are to be named to a city council or a legislative body, the object being to distribute representation in such body as far as possible in ratio to the strength of the various political groups in the district from which the representatives are chosen, thus allowing the minorities to be represented rather than to be swept aside by the avalanche of votes polled for the majority party.<sup>32</sup>

In an effort to secure more direct control by the electorate over the government a number of states and cities have adopted the initiative, referendum, and recall. These devices are used to check legislative organs or to supplement their work by permitting the voters to deal with numerous questions which arise in the field of government. The initiative allows a certain small percentage of the voters, ranging from five to twenty-five per cent, to frame a constitutional amendment or statute and secure its adoption. This is accomplished by the circulation of petitions. After the required number of signers is secured, the bill may be submitted to the legislature, becoming a law if this body enacts it. If the legislature fails to pass the proposed measure, it is referred to the people and becomes effective when ratified by the necessary vote. This is known as the "indirect" initiative. The "direct" initiative is found in those states which submit the projected measure to the people without the intervention of the legislature, such measure becoming effective when adopted by the electorate by the required vote. The referendum permits a small percentage of the voters to require a constitutional amendment or legislative act to be referred to the electorate for final decision. The referendum may be optional, as where the legis-

<sup>31</sup> Holcombe, *op. cit.*, 206-207.

<sup>32</sup> Proportional representation is discussed in the chapter on the Legislature in Action. See C. G. Hoag and C. H. Hallett, *Proportional Representation* (1925), and George Horwill, *Proportional Representation: Its Dangers and Defects* (1926).

lature itself provides that a measure shall not become effective until adopted by the voters. The mandatory referendum exists when a few voters may oblige the legislature to submit such measure to the people, or, as in respect to constitutional amendments, they may not be effective except after ratification by the voters at the polls. These two devices, which are usually found together, although the referendum may and does exist without the initiative, are employed jointly in eighteen states. They serve chiefly as a check upon the legislature—though seldom used—and as a means of overcoming cliques which too often secure control of legislative bodies to thwart the will of the people, and as an instrument of education, requiring public discussion and popular decision. They have not proved the panacea anticipated by reformers, nor have they brought about the disastrous consequences predicted by opponents. To some extent they have liberalized the governmental process, but they have also added another burden to an already overburdened electorate, and have increased its indifference, which is indicated by non-voting or by the defeat of the measures submitted.<sup>33</sup>

The recall is a means of removing public officials from office by popular action before the expiration of the term for which they were elected. Appearing in the charter of Los Angeles in 1903, it has been adopted in ten states, where it is applied to all public officers, and in several others where it applies to only certain officers, judges sometimes being exempted from its operation. It requires the circulation and signature of a petition which must contain the names of from ten to fifty-five per cent of the voters and set forth the charges against the incumbent. Some thirty or forty days after filing the recall the election is held. It is often provided that a candidate may not be subject to recall until after he has been in office a prescribed time; for instance, six months. Originally the official was required to enter another election against a candidate or candidates supported by groups sponsoring the recall, the one receiving the highest vote being successful. At present most of the states having the recall provide that the ballot must contain two parts, one space reserved for the voter to decide whether the candidate should be recalled and another to determine who his successor shall be in the event of a ma-

<sup>33</sup> W. F. Dodd, *State Government* (2nd Ed., 1928), 547-553; C. A. Beard and B. E. Schultz, *Documents on the Initiative, Referendum, and Recall* (1912); and A. Lawrence Lowell, *Public Opinion and Popular Government* (1913).

majority vote in favor of removing the official in question. The candidate receiving the highest vote is ordinarily elected after the recall proposition has been carried by the necessary majority. The incumbent may appear as a candidate to succeed himself, but this plan would seem to defeat the purpose of the recall itself. A better plan would seem to be to fill the vacancy by appointment rather than by this election process. The recall may be defended on the ground that it makes public officials responsive and responsible to public opinion, giving the people immediate means of discharging those officers who have violated the trust imposed in them. It seems of unusual value in cities having the manager plan of government, where powers are concentrated in a few hands, inviting dangers which require some check such as the recall affords. On the other hand, it may invite continual and irritating interference with the duties of public officials, breaking down the authority which they must enjoy to discharge their tasks. It is especially condemned when applied to judges in that it tends to bring them under political influences which prevent the impartial functioning of the courts. In like manner, recall of administrative officials may be undesirable in that it substitutes partisan opinion for expert opinion. Fortunately this device has been used conservatively, not over seventy-five or eighty officials having been removed by it, most of these being city officials.<sup>34</sup>

Such plans as these strive to bring the government into closer touch with the prevailing will of the people, but in doing so they serve to emphasize and aggravate what has become one of the basic defects of present day party life—giving the voter too much to do. It is quite desirable that means be provided to secure the ultimate domination of the popular will in governmental affairs. It is necessary to keep officials definitely answerable for their acts. But this cannot be accomplished by the modern process of elaborating and making more intricate the machinery of government. It is humanly impossible for the average voter to express an intelligent choice on more than five or six groups of officials; it is absurd to ask him to select some twenty or thirty sets as is now the case. The remedy for this condition is to relieve the electorate of the burden of electing officials all the way from local constables to the President of the United States. The solution is to allow them to choose the *important* officials and have the minor officials appointed under merit rules. We have learned this lesson in our national government and in certain of our cities;

<sup>34</sup> Cf. Holcombe, *op. cit.*, 335-336, 449-460; Brooks, *op. cit.*, 490-506.

the principle should be applied on a wider scale. This matter was stated very conclusively by Woodrow Wilson, as follows:

Elaborate your government; place every officer upon his own dear little statute; make it necessary for him to be voted for; and you will not have a democratic government. Just so certainly as you segregate all these little offices and put every man upon his own statutory pedestal and have a miscellaneous organ of government, too miscellaneous for a busy people either to put together or to watch, public aversion will have no effect on it; and public opinion, finding itself ineffectual, will get discouraged, as it does in this county, by finding its assaults like assaults against battlements of air, where they find no one to resist them, where they capture no positions, where they accomplish nothing. You have a grand housecleaning, you have a grand overturning, and the next morning you find the government going on just as it did before you did the overturning. What is the moral? . . . The remedy is contained in one word: *simplification*. Simplify your processes, and you will begin to control; complicate them, and you will get farther and farther away from their control. Simplification! simplification! simplification! is the task that awaits us; to reduce the number of persons to be voted for to the absolute workable minimum—knowing whom you have selected; knowing whom you have trusted; and having so few persons to watch that you can watch them.<sup>35</sup>

<sup>35</sup> Quoted by C. A. Beard, *American Government and Politics* (5th Ed. 1928), 522.



## CHAPTER XXXII

### THE PLACE OF THE LEGISLATURE IN THE GOVERNMENT OF THE STATE

Governments, like clocks, go from the motion that men give them.  
—WILLIAM PENN.

#### I. PRINCIPAL TENDENCIES IN THE DEVELOPMENT OF STATE LEGISLATURES

The legislative assembly must, at least in theory, be regarded as the apex of our governmental system in the states. It is not only the body which controls the policies of the administration, which appropriates funds for the purposes of government, and which may remove the chief executive officers, but is also the means by which the citizens of a representative democracy control their government. It would seem, therefore, to be entitled to a position of dignity and importance; there is, however, in this instance, almost complete dissociation between theory and fact.

In the development of the state legislatures there have been two principal tendencies: (1) the standardization of their form and (2) the limitation of their powers. The bicameral form has come to prevail in each state. The two houses exercise very much the same legislative powers and operate under the same limitations both as to the enactment of ordinary legislation and as to procedure. Usually the power to originate revenue bills is exclusively conferred by the state constitution upon the lower house with the upper house having only the power to amend such bills. Upper houses, however, in practice, under the guise of amendment, practically originate revenue bills and in the free conference committee generally force the lower houses to accept their recommendations. In the actual legislative process the upper house is the more influential.

While the upper house has overcome the constitutional advantage of the lower house in legislative affairs, it has maintained its favorite place in the state constitution in other matters. Whatever executive powers are still exercised by state legislatures are in its

hands. While it does not exercise as extensive executive authority as the council of colonial days, it still has the power of confirming or rejecting the governor's nominations for administrative and in some states judicial positions. The judicial powers of the legislatures are divided between the houses, the lower house exercising the power of impeachment and the upper house the power of trial for impeachment. "Whilst the vesting of the power of confirming executive appointments and trying impeachments in the upper houses would seem," says Holcombe, "to indicate a greater degree of confidence in these bodies, no such partiality has been shown with reference to the exercise of purely legislative powers. With respect to these the two houses have been treated alike. The principal questions that now arise are these: First, is the bicameral system the best system under existing conditions? Second, has the limitation of powers proceeded as far as is necessary and proper, or should the powers of the legislatures be further limited?"<sup>1</sup>

## II. THE OPERATION OF THE BICAMERAL SYSTEM

The arguments for bicameralism are many, varied, and comparatively well known. They may, however, be reduced to two general principles. In the first place, it has been supposed that the legislative branch of the state governments should represent the whole people, and not merely a majority. And it was supposed, quite rightly, that the aristocrats always would be in the minority; that is, if they became the majority, they would be democrats, politically speaking. "Sanguine democrats, like Jefferson, believed that the majority in each locality would naturally choose the best men for their representatives. Less sanguine men, like Adams and Jay, believed that the majority would choose men of their own sort. They feared that the aristocracy would not be properly represented under a system of unbalanced majority rule. They advocated the bicameral system, in order that the majority might have special representation in a separate house."<sup>2</sup> Probably the more legitimate reason for bicameralism, inasmuch as this aristocratic theory was rejected in most of the original states, was the belief that a two-chambered legislative assembly would insure more careful deliberation and procedure in the enactment of statutes. While it is true that state senators frequently were required

<sup>1</sup> Arthur N. Holcombe, *State Government in the United States* (Rev. Ed., 1926), 247-248.

<sup>2</sup> *Ibid.*, 248.

to be men of a maturer age, perhaps of broader experience, and in a number of cases even of greater wealth, they generally were chosen by the same electorates as were the members of the lower houses. They were, therefore, representative of essentially the same element of society. In line with this structure of state senates, it was expected that they would restrict themselves to the review of the acts of the lower houses in the interest of all the people, and that they, therefore, would not obstruct the decisions of the majority.

Do the slight differences in the structure of the two houses of our legislatures justify the maintenance of the bicameral form as a means of realizing more fully the representative principle in state government? State legislatures at the present time are composed of lower houses of from thirty-five in Delaware to four hundred and fourteen in New Hampshire and of senates of from seventeen in Delaware or Nevada to sixty-seven in Minnesota. Thus, the senate is approximately one-third as large as the house in an average state; this means that it naturally will be a more select body.<sup>3</sup> The dignity of the senate is not due solely, however, to its more diminutive size. Normally, senators are chosen for longer terms than are representatives, although in many states both are elected for a period of two years. Differences in requirements of members and in qualifications of the electorates have practically been inconsequential, and have quite generally been abolished. "At present, therefore, in most states the principal differences in the character of the legislative houses," says Holcombe, "result from differences in their size and in the manner of apportioning their members."<sup>4</sup> Except in New England the basis of representation in the lower house is universally the county. The simplest type of representation upon such a basis is that in which each county is a single-member election constituency, with additional "floating representatives" for unusually populous areas. In more congested areas the distribution of representation according to population is, of course, necessary, and usually is accomplished by means of apportionment and reapportionment over specified periods. Not infrequently counties are given an equal number of representatives, but special districts created in populous areas whereby two or more counties are joined for the purpose of securing additional representation are utilized. In New England except in Massachusetts the town is, quite naturally, the basis

<sup>3</sup> Walter F. Dodd, *State Government* (2nd Ed., 1928), 142-143; 171-172.

<sup>4</sup> *Op. cit.*, 250.

of representation. Speaking generally, methods of apportionment throughout the country are so diverse in character as to permit of no classification or generalization upon either a geographical or population basis.<sup>5</sup>

Upper houses are much more amenable to classification. In a large majority of the states senatorial districts are composed of single member constituencies formed by combining or dividing counties with the object of representing approximately equal portions of the electorate. In several states populous counties are allotted more than one senator without dividing them into single-member districts; the senators in such event are elected at large. In a small number of states each county receives an equal number of senators regardless of population.<sup>6</sup> In certain instances allocation of representation is based upon the distribution of certain classes of persons, such as citizens, qualified voters, adult male inhabitants, or white population. In New Hampshire, representation in the Senate is based on the proportion of direct taxes paid.<sup>7</sup> In general population is regarded as the primary basis of representation in both houses of the legislatures.

Periodical reapportionment is required by the state constitutions as a means of correcting the inequalities in representation that result from shifts in population; however, there is no method for enforcing such constitutional provisions. "Except in a few of the oldest and smallest states, a reapportionment of members is made by each legislature every ten years. Some states place constitutional restrictions upon the power of apportionment, requiring that legislative districts be as compact in form and as nearly equal in size as practicable. Two of these states [New York and Oklahoma] expressly provide for the judicial review of legislative apportionments for the correction of errors, and doubtless in others the courts have the power to set aside arbitrary and unreasonable apportionments."<sup>8</sup>

It is probably in connection with representation in the state legislature that gerrymandering occurs most frequently. The gerrymander may be defined as the determination of the metes and bounds of an electoral area in such a way as to affect or determine its political complexion.<sup>9</sup> For instance, in a largely Republican center there may be two comparatively contiguous Democratic

<sup>5</sup> John Mabry Mathews, *American State Government* (1924), 157-158.

<sup>6</sup> Holcombe, *op. cit.*, 251.

<sup>7</sup> Dodd, *op. cit.*, 153.

<sup>8</sup> Holcombe, *op. cit.*, 251.

<sup>9</sup> Frank G. Bates and Oliver P. Field, *State Government* (1928), 149.



communities. These communities may be separated into several districts, and portions of each attached to other districts in order to overcome the Democratic majority. Oftentimes organized minorities are by this means able to gain control of the legislature and to perpetuate themselves in office. In addition to the more general precautions taken against gerrymandering which have been mentioned above, several states have enacted statutes specifically designed to prohibit it. "Some prescribe the basis of equality by mathematical formula, as that no district shall contain less than four-fifths of the ratio of representation. Mathematical equality is impossible, and the common requirement that no county be divided in creating a district (except as it is made into two or more districts) often enforces a substantial inequality. In some states the courts have been strict in construing constitutional limitations of this character. Other courts, such as that of Illinois, on the other hand, have left a fairly wide discretion to legislative bodies. New York belongs to the group of states in which the courts are liberal in their dealing with legislative apportionments, but the New York constitution of 1894 imposes a number of restrictions, and legislative apportionments of 1906 and 1916 were held invalid as violative of such restrictions. In the states where local bodies make apportionments within counties, they are subject to judicially enforceable constitutional restrictions. But neither constitutional provisions nor their judicial construction have by any means been able to prevent gerrymandering."<sup>10</sup>

The gerrymander is possibly seen at its worst in connection with the representation of urban areas.<sup>11</sup> This is particularly true in the states containing the larger metropolitan districts, such as New York, Illinois, Michigan, Missouri, Maryland, Pennsylvania, New Jersey, Rhode Island, and Delaware. For instance, Providence contains approximately forty per cent of the people of Rhode Island, but has only one-fourth of the Representatives and only one of the thirty-nine senators.<sup>12</sup> New York City, whose population constitutes about fifty-four per cent of the population

<sup>10</sup> Dodd, *op. cit.*, 152. One of the most enlightening studies of this political phenomenon is to be found in C. O. Sauer, "Geography and the Gerrymander," 12 *Am. Pol. Sci. Rev.*, 403 (1918).

<sup>11</sup> For a general treatment of this problem see J. M. Mathews, "Municipal Representation in State Legislatures," 12 *Nat'l. Mun. Rev.*, 135 (1923); O. A. Walsh, "Government by Yokel," 3 *Am. Mercury*, 199 (1924); A. C. Miller, "Curbing a Metropolis in a Constitution," 7 *Jour. Am. Bar Assn.*, 17 (1921).

<sup>12</sup> L. W. Lancaster, "Rotten Boroughs and the Connecticut Legislature," 13 *Nat'l. Mun. Rev.*, 678 (1924).

of the state, has only sixty-three of a hundred and fifty seats in the Assembly. Chicago, having almost half of the population of Illinois, furnishes only thirty-seven per cent of the membership of each house of the legislature. Detroit has about thirty-four per cent of the population of Michigan, but has less than fifteen per cent of the representation in each house. Bridgeport, New Haven, Waterbury, and Hartford are not proportionally represented in the Connecticut Senate, which is the popular house of that state.<sup>13</sup> The significant feature about this situation is not merely its obvious injustice but its continual recurrence. The supreme courts of Illinois, Kansas, and New York have consistently refused to invalidate "gerrymandering" apportionment acts unless constitutional prohibitions or requirements have been grossly disregarded. Proposed reforms, such as proportional representation and direct legislation, attempting to establish more equitable relations, particularly if they have implied an increase in the political strength of the urban areas, have met with rabid opposition and usually with defeat. The situation became so acute in Illinois in 1925 that the municipal council of Chicago introduced a resolution favoring secession and the formation, by the metropolitan district, of a separate state.<sup>14</sup>

It is very difficult, if not altogether impossible, to justify this discrimination in both branches of the state legislatures upon any accepted tenet of American political philosophy. It can very easily be explained, however, in terms of the "rural bias." For many years, probably as a result of the general dissemination and acceptance of the Jeffersonian concept of an agrarian democracy, Americans have thought of industry, sobriety, and conservatism as the exclusive qualities of rural populations. Cities have been regarded as the seats of radicalism in politics, economics, and religion. An examination of the personnel of some of the more radical political organizations of the United States casts serious doubts upon this assumption. The Granger movement was essentially an agrarian revolt against the railroads; the Greenback party of 1876 was a farmers' organization crying for cheap money; the Populist party of 1880 was a rural organization with distinctly socialistic principles; the cry for free silver came from the agricultural interests; Arthur Townley's Nonpartisan League, an

<sup>13</sup> C. C. Hubbard, "Legislative War in Rhode Island," 13 *Nat'l. Mun. Rev.*, 477 (1924).

<sup>14</sup> C. M. Kneier, "Chicago Threatens to Revolt," 14 *Nat'l Mun. Rev.*, 600 (1925); also editorial, "Yes, We'd Like to Pull Out of Illinois," *Chicago Tribune*, June 26, 1925.

agrarian organization, was probably the most successful political venture of the collectivistic school. While city populations have distinctly followed socialistic tendencies, this action has been due quite as much to physical necessity as to political or economic heterodoxy.

It is perhaps justifiable, on the basis of the federal analogy, to discriminate against municipalities in the upper houses of the state legislatures. The inequality of representation in the popular assemblies, however, raises some very fundamental questions. The first of these is the problem of the protection of the rights of rural minorities. We have grown accustomed, somehow, to think of the rights of minorities in the United States as being amply protected by the guarantees of the Constitution and the surveillance of the judiciary. If this principle is not applicable to rural minorities, then grave injustice has been rendered for many years during the period of urban minority. It would seem also that the rights of minorities everywhere are unsafe. Furthermore, one of the fundamental principles of American party government—the effective control of legislation by the majority party—is violated by this discrimination. The representative principle is seriously compromised. It seems that the adoption of either some scheme of rural “home rule” or the principle of proportional representation might remedy this situation. If a proper working relation cannot be established between rural areas and metropolitan centers, then there remains the possibility of converting the larger metropolitan groups into city states.

Another serious problem which has arisen in connection with the bicameral system, and which is, at least indirectly, a result of it, is the over-representation of majorities in the legislatures of several states. One of the chief purposes of bicameralism has been to protect aristocracy from democracy, the minority from the majority, the wealthy from the poor. Jefferson pointed out as early as 1782 that it was ceasing to perform this function. Speaking of Virginia, he said that “the Senate is by its constitution too homogeneous with the House of Delegates. Being chosen by the same electors, at the same time, and out of the same subjects, the choice falls of course on men of the same description. The purpose of establishing different houses of legislation is to introduce the influence of different interests or different principles.”<sup>15</sup> “We do not therefore derive from the separation by our Legislatures into two houses,” he further stated, “those benefits which a proper

<sup>15</sup> *Writings of Thomas Jefferson* (Ford Ed., 1904), VI, 520.

application of principles is capable of producing, and those which alone can compensate the evils which may be produced by these dissensions." The situation in Virginia which Jefferson was here deploring now exists in all the states. The result has come to be the double representation of the majority. In fact, the upper houses of state legislatures represent a larger majority than the lower houses. This is true because their members are elected from larger districts. The larger the electoral districts, the more favorable the results of the election will be to the majority party. There are two reasons for this: first, the importance of the majority is increased by any system of representation based on plurality elections in local districts and, second, the disproportionate representation of the majority may be further augmented by gerrymandering.<sup>16</sup>

The fact is that under the present structure of legislatures the checks that exist are due to differences of opinion among the majority rather than to any safety device found in bicameralism. Benjamin Franklin asked in the latter part of the eighteenth century: "May not the wisdom brought to the legislature by each member be as effectual a barrier against the impulses of passion, etc., when the members are united in one body, as when they are divided? If one part of the legislature may control the operations of the other, may not the impulses of passion, the combinations of interest, the intrigues of faction, the haste of folly, or the spirit of encroachment in one of these bodies obstruct the good proposed by the other, and frustrate its advantages to the public?"<sup>17</sup>

Now, it is true that even the representation of the majority may be justified on the grounds of party government. It fixes responsibility whereas a bare majority would place control in a few hands. It is likewise defensible for the same reason for the majority to control elections. Bicameralism, however, is not necessary to achieve these ends. "In short," says Holcombe, "the system of government by party requires that the majority party have effective control of the legislature. Ordinarily in close states effective control cannot be secured without over-representation. Whether such a system is a good system depends upon the manner in which the majority party uses its power. Certainly it is not the system contemplated by the framers of the original state constitutions."<sup>18</sup>

<sup>16</sup> Holcombe, *op. cit.*, 251-253.

<sup>17</sup> See the *Works of Franklin* (Bigelow Ed. 1888), X, 185-188. For a balanced discussion of the relative merits of bicameralism and unicameralism, see Robert Luce, *Legislative Assemblies* (1924), 24-42.

<sup>18</sup> *Op. cit.*, 253.



It is thus to be noted that the forms and functions which were correlated and established by the framers of the constitutions of the original states have wandered far afield in the modern development of the political institutions of the states. In consequence, the simplicity and appropriateness which characterized the organizations and functions of our state legislatures in their conception have been lost in the evolutionary process. The bicameral system has not only failed to preserve the representation of minorities, but has even been utilized to strengthen the control of the majority party over state government. It has also resulted in obvious and regrettable malfeasances in the attempts of the majority party to perpetuate itself. Since it has accentuated the control of the majority it probably has not had the effect of providing a careful scrutiny of action of the lower house by the senate. The existence of executive functions in the senate has further aided the majority in increasing its control over state administration. Since bicameralism has failed in the accomplishment of its original objects and has in addition developed still further weaknesses under the party system, its retention as a feature of our state governments has been challenged.

### III. THE MOVEMENT TOWARD UNICAMERALISM IN LEGISLATIVE ASSEMBLIES

While no American state has, as yet, abandoned the traditional system of bicameralism, many precedents have been established which, it is believed, will render the transition to unicameralism much less difficult than has been the case in many other governmental reforms. In the first place, the bicameral municipal legislature was at one time quite universal in the United States. Its inefficiency, immobility, and adaptability to political chicanery and corruption has caused not only its decline but almost total abolition. At the present time the twenty-five largest cities in the United States have unicameral legislative bodies. In consideration of the fact that the assemblies of these municipalities represent, in several individual cases, more people, and appropriate more money, than the legislatures of several states, it can no longer be successfully contended that the retention of bicameralism is necessary for purposes of representation or the safeguarding of expenditures. The same abandonment of bicameral legislative organization has occurred in Canada; seven of the nine provinces at the present time have single chambered assemblies. Not one of the cantons

of the Republic of Switzerland has a bicameral legislature. The national legislatures of Norway, Bulgaria, Jugo-Slavia,<sup>19</sup> and several of the European provincial legislatures are organized upon the unicameral basis. It is significant also to note that in the enactment of the fundamental laws of our states, our state constitutions, we have abandoned the practice of entrusting the task to a bicameral body; all constitutional conventions have been single-chambered. Indeed, the general movement for unicameralism in this country long since has overrun the bounds of academic speculation, and in several instances has become a really vital political issue. The single-chamber has been suggested in no less than four gubernatorial messages or addresses in recent years.<sup>20</sup> Although in each of the three instances in which proposals for unicameral legislatures have been presented to the people, it has been defeated by a decisive vote, it, nevertheless, indicates that there is developing a sentiment for smaller and more simply organized legislative assemblies.<sup>21</sup>

This sentiment apparently has received considerable support from legislators themselves. The report of a joint committee of the Nebraska legislature of 1913 recommended the submission in 1916 of an amendment to the state constitution which would establish a single chambered legislature. Although the report received the approval of a substantial majority of the legislature, the vote was not adequate for a popular referendum in the 1915 session. In the constitutional convention of that state in 1919, a resolution for the separate submission of a provision for a unicameral legislature was lost in a tie vote. The Commonwealth Club of San Francisco originated and fostered a constitutional amendment in California in 1914 for a similar reform, but the proposal, though it was passed by both houses of the legislature, failed by five votes to secure the majority necessary to refer it to the electorate. The New York Bureau of Municipal Research, after a governmental survey of Nevada, included in its report a recommendation of a unicameral legislature for that state.<sup>22</sup> The legislative committee of the Cleveland Citizens' League has also

<sup>19</sup> *A Political Handbook of the World* (1929), *passim*.

<sup>20</sup> 9 *Am. Pol. Sci. Rev.*, 316 (1915); 21 *Ibid.*, 100 (1927).

<sup>21</sup> Oregon .....	1912	30,000 for	71,000 against
Oregon .....	1914	62,376 for	123,429 against
Oklahoma .....	1914	71,000 for	94,600 against
Arizona .....	1916	11,631 for	22,286 against

<sup>22</sup> See *Nevada State Journal*, Nov. 20, 1924; also 14 *Nat'l Mun. Rev.*, 679 (1925).

recommended that "the adoption of a unicameral legislature is a subject which should be given the most serious thought by the people of the state before the next constitutional convention is called in 1932."<sup>23</sup> In several other state legislatures, notably in Washington and Michigan, there have been growing convictions that bicameralism is not compatible with a really democratic and vigorous type of state government.<sup>24</sup>

It would seem, then, that bicameralism as a feature of our state governments is being subjected to critical examination and may be in the process of disappearing. The change, if it occurs, will doubtless be more gradual than has been the case with municipal bicameralism because the rural voter is more conservative than the urbanite.

But unicameralism alone would not be a complete solution of the problem of *unrepresentative* legislative bodies. It is quite conceivable that a single chamber might be as representative of the majority party, as thoroughly discriminatory against urban populations, and as completely subject to partisan intrigue as the bicameral assemblies have been. A far more pressing problem is the provision of some machinery whereby the results of popular choice may find proportionate expression in the legislative personnel. In other words, a system of representation must be devised that will register in the membership of the legislature the same relative division in public opinion that is expressed at the ballot box.

#### IV. PROPORTIONAL REPRESENTATION

The principal of proportional representation is being extensively used in European systems.<sup>25</sup> In fact, it has been so generally accepted as to cease to be an issue.<sup>26</sup> "The ideal of proportional representation for the choice of members," says Dodd, "is that representation shall as nearly as possible be in mathematical pro-

<sup>23</sup> See "Report of Legislative Committee," *Greater Cleveland*, 182 (June 15, 1927).

<sup>24</sup> Upon this general subject see H. B. Lees-Smith, *Second Chambers in Theory and Practice* (1923), and H. W. V. Temperly, *Senates and Upper Chambers* (1910).

<sup>25</sup> The following countries are using it in some form: Austria, Belgium, Bulgaria, Czecho-Slovakia, Denmark, Esthonia, Germany, Greece, Holland, Ireland, Poland, Portugal, Sweden, and Switzerland. C. G. Haines and B. M. Haines, *Principles and Problems of Government* (Rev. Ed., 1926), 237-238.

<sup>26</sup> Howard L. McBain and Lindsay Rogers, *The New Constitutions of Europe* (1922), 115.

portion to the votes cast by each separate group or party, whatever may be the number of parties. If a district elects only three representatives, this limitation of number means that not more than three groups of voters may be represented, and that the two stronger groups will ordinarily elect the three. Proportional representation, therefore, requires larger districts, each electing a greater number of persons. Suppose, for example, a district having seventy thousand voters and electing seven members. A mathematical distribution of the members might be as follows:

Republicans .....	30,000 votes	3 members
Democrats .....	20,000 votes	2 members
Progressives .....	10,000 votes	1 member
Socialists .....	10,000 votes	1 member

Even with large districts, and with a scheme that will count every vote effectively, exact mathematical results will, of course, not be obtained; but the mathematical result will be clearly much more accurate than under the plurality plan, and more so than under the cumulative system. Both cumulative voting and proportional representation destroy to a large extent the possibilities of effective gerrymandering.”<sup>27</sup> There are, of course, various adaptations of this principle of corresponding mathematical representation. Their general principles, however, may be indicated in a consideration of the two most widely used systems.

1. *The Hare System.* The Hare system is in reality a combination of preferential voting and proportional representation, and has generally been adopted in American cities which elect their councils according to the principles of proportional representation. The ballot under such a system is not dissimilar to the generally utilized preferential ballot. The proportional feature appears in the tabulation of results. The voter indicates his choice of the candidates listed according to first, second, third, fourth choice, and so on. After all the ballots have been sorted according to the first preferences indicated, the total number of votes cast, excluding invalid ballots, is divided by the number of officials to be elected *plus one*, and the quotient thus obtained becomes the electoral quota required for election. Any candidate found to have received votes equal to or in excess of this amount on the first classification of ballots is declared elected. If no one receives such a number, the lowest candidate is eliminated, and his ballots dis-

<sup>27</sup> *Op. cit.*, 162-163.



tributed according to indicated second choices. This process of redistribution is repeated until someone is elected. The votes which have been counted toward the election of the candidate receiving the quota are then eliminated, and the process continues. Of course, if a point should be reached where the number of candidates surviving and the number of seats unfilled coincide, the remaining candidates would be declared elected, regardless of whether or not they had the required quotas. It is conceivable that a candidate eliminated in the count of first or second choices might actually be stronger in votes than the ones elected finally. There is thus involved a certain element of chance, which in practice, however, is quite negligible.<sup>28</sup> The Hare system is essentially a non-partisan system of election. The voter casts his vote for individuals rather than for parties or groups.<sup>29</sup>

2. *The List System.* Of another type entirely is the system at present utilized extensively in Germany, Belgium, Austria, and several other continental countries. Under the list system of proportional representation each organized group prepares and presents a list or ticket, which only indicates either individual or group choice for the number of seats to which the district is entitled. The voter does not as a rule vote for the individual candidate but for the group, though he is not under all list systems compelled to vote for all the candidates on the list of his party group. He has as many votes as his district has seats, and may in some instances cast all of them for one candidate.<sup>30</sup> All elections are, therefore, strictly partisan under this plan. The seats are received by the list and are in the proportion which the number of votes cast for each list bears to the total number of votes cast in the district. The order in which the names in each ticket appear thus affects the result, inasmuch as the choices for the filling of seats to which the list is entitled is from the top, unless otherwise indicated by the voter. This order usually is determined by the list or party managers. It is, of course, possible, but not usual, to elect candidates whose names appear toward the bottom of the list in districts electing only three or four members. It is probably about as difficult, however, as to elect candidates by writing in names in American elections.

The operation of the system may be illustrated hypothetically.<sup>31</sup>

<sup>28</sup> Haines and Haines, *op. cit.*, 238-239.

<sup>29</sup> Clarence Gilbert Hoag and George Hervey Hallett, *Proportional Representation* (1926), 77-110.

<sup>30</sup> McBain and Rogers, *op. cit.*, 83-116.

<sup>31</sup> Hoag and Hallett, *op. cit.*, 60-76.

Suppose that a state has been divided into six districts for the purposes of electing sixty representatives to the state legislature or ten from each district. Assume that three parties are competing for the control of the legislature, and that 75,000 votes are cast in a particular district. The electoral quotient is determined by dividing the total vote received by each ticket successively as follows: <sup>32</sup>

	REPUBLICAN	DEMOCRAT	SOCIALIST
Divide by 1.....	30,000	25,000	20,000
Divide by 2.....	15,000	12,500	10,000
Divide by 3.....	10,000	8,333	6,666
Divide by 4.....	7,500	6,250	5,000

The ten highest quotients obtained by this division are arranged in descending order, and the lowest of the ten becomes the electoral quotient, which in this case is 6,666. Each list is entitled to as many seats as this quotient is contained in the total number of its votes. The total Republican vote (30,000) divided by the electoral quotient (6,666) gives that list four seats; therefore, the first four names on that list are elected. The same method applied to the other lists gives the Democrats and the Socialists three seats each.

It appears quite obvious that numbers of votes are lost under this system. The Republicans lose 3,336 votes since to elect four members they need only 26,664 (4 times 6,666); the Democrats 5,002 and the Socialists 2. The problem has been solved by Germany in the following very interesting way. She has created combinations of districts, including three, four, or ten, as the case may be. For this large or combination district each party nominates an additional list. The surpluses in each of the several districts are thus carried over and may help to elect an additional candidate. By this means very few votes are lost and a close approach to a mathematical representation is made.

Proportional representation undoubtedly presents the best available solution for the problem of securing really representative legislatures. It is complicated, however, and therefore demands a somewhat educated electorate for its successful operation. The List System would not be as well suited to our municipal elections as the Hare System on account of its partisan character, but would

<sup>32</sup> This process of division is continued until an "electoral quotient" is obtained that, if it is applied to the total vote of each list, will give the requisite number of seats.

for this same reason be particularly applicable to the election of state officials.<sup>33</sup>

The advantages claimed for the List System are majority rule, fair representation of the minority, and more able representatives in general. The gerrymander is eliminated. Party government is promoted. Voters are encouraged to exercise the franchise because their votes count.

## V. LIMITATIONS ON THE POWERS OF STATE LEGISLATURES

It has already been noted that since the establishment of the original state constitutions there has been a general tendency to place further limitations upon the powers of state legislatures. These limitations have found their way into both the national and state constitutions. Legislatures have lost the power to elect United States Senators; they have been placed under certain limitations as to the suffrage; and their social legislation has by virtue of the Fourteenth Amendment been subjected to the judicial review of the Supreme Court of the United States.

The limitations in the state constitutions on legislative powers generally relate to (a) financial matters, (b) special legislation, and (c) procedure. Financial matters include taxation, appropriations, and indebtedness. Taxes must be for a public purpose, the rate must be uniform, and sometimes a maximum rate is fixed. Money can only be appropriated for a public purpose and certain forms are sometimes prescribed for appropriation bills such as the elimination of all other subject matter and the specification of the purpose and the amount of the appropriations. The extravagance of legislatures in granting aids to railroads, canals, and turnpikes lead to the requirement of a referendum to the voters on such matters. In some instances the constitution fixes the limit of the state debt which can only be exceeded by a constitutional amendment.

It has been a general practice of state legislatures to spend too much time on special or local legislation. To correct or mitigate this abuse most state constitutions provide (1) that special legislation shall not be passed if a general law will suffice; (2) that on certain enumerated subjects, such as granting divorces, creating corporations, or concerning particular affairs of cities or counties,

<sup>33</sup> The introduction of proportional representation in the United States has met with constitutional barriers. See William Anderson, "The Constitutionality of Proportional Representation," 12 *Nat'l. Mun. Rev.*, 745 (Supplement, December, 1923).

no special law shall be enacted, and (3) that special or private bills shall be passed by a two-thirds majority or only after notice to the community or locality involved.

Legislative procedure is generally limited by specific requirements as to quorum, enacting clauses, origination of money bills, number of readings of bills, titles, and revisions of bills. Bills are generally allowed to contain but one subject and must be passed by an affirmative majority.<sup>34</sup>

It is further necessary to indicate the attitude of the courts toward these limitations in order to see just how restrictive they are. The general theory of the powers of state legislatures is that they possess all the legislative powers of the state governments which are not denied them by the national or state governments. It would seem to follow that unless an act of a state legislature is clearly prohibited by either the national or state constitution, it would be valid. The courts claim to operate on this theory. That is, if doubt exists as to the constitutionality of a legislative act, they will decide in favor of its validity. It is very difficult to square the practice of the courts with this theory. It is doubtful if they have any policy that is regularly or even frequently followed. What seems to be much closer to the facts is that they determine their attitude toward a legislative act and then devise a method of approach that in their language irresistibly and logically leads to the conclusion already reached. It is impossible to say that they deal liberally or conservatively with legislative limitations as a policy. Their attitude varies with the act or subject matter involved and changes with the personnel of the court. A study of the decisions of any state supreme court over a period of fifty years is conclusive of this fact. It is safe to say that legislative limitations are not always liberally construed.<sup>35</sup>

There is a growing feeling that legislative bodies are not performing their function as well now as in the days of a more simple society. There is a tendency to restrict still further the initiative of state legislatures in line with English and continental practice and John Stuart Mill's theory of the functions of representative bodies. He said that they were no more capable in legislation than in administration. In the American system they have no initiative in the latter but still control every step in the former.

<sup>34</sup> See R. M. Story, "Amendment of Statutes," 10 *Am. Pol. Sci. Rev.*, 743-748 (1916), and H. W. Dodds, "Procedure in State Legislatures," *Annals of Am. Acad. of Pol. and Soc. Sci.*, 68 (Supplement, May, 1918).

<sup>35</sup> On the construction of state constitutions, see Thomas M. Cooley, *Constitutional Limitations* (8th Ed., 1927), I, 97-172.



Accordingly, it has been proposed that there should be established by constitutional amendment a Legislative Council consisting of the governor and an appropriate number of the members of the legislature to assist it in the legislative process. The legislative members of the council should be elected at the beginning of each regular session following a general election.<sup>36</sup> The council should be subject to dissolution by the majority vote of the legal membership of the legislature.<sup>37</sup>

The Legislative Council would constitute a permanent committee on proposed legislation. It should be empowered to elect one of its members as secretary of the legislature, who should be ex-officio secretary of the council. It should be its duty to study the needs of the state and to frame and propose such legislation as it thinks that the welfare of the state requires. It would be allowed to supplement existing legislation by ordinances having the effect of law. It could be used by the legislature for other appropriate purposes such as investigations. The members of the council should receive such additional compensation as is warranted and provided by law.

The council should be a continuous body, gathering material, proposing a legislative program, and properly drafting measures for introduction at the next legislative session. It would naturally be composed of the leaders of the legislature whose influence would, of course, be increased by their superior knowledge of the subject matter involved in the proposed legislation. Such a body would give tone, direction, and effectiveness to the legislative program, and, in the main, render a service not entirely unlike the modern cabinet; though, of course, it would exercise no political influence over the other members of the legislature. It would be most largely a means for the better direction of the initiative in legislation; however, the legislature would not be restricted to its proposals. It would also serve as a critic of the administration, and would, therefore, be in a position to furnish accurate and reliable information to the legislature on administrative policies.<sup>38</sup>

<sup>36</sup> It has been suggested that the council consist of seven members from the legislature elected by the principle of proportional representation with the single transferrable vote.

<sup>37</sup> This proposal is predicated on the basis of a unicameral legislature.

<sup>38</sup> See *A Model State Constitution* (Pub. by Nat'l Mun. League, 1922), Secs. 29-32. See also explanatory notes, *ibid.*, 22-25.

## CHAPTER XXXIII

### THE LEGISLATURE IN ACTION

The fundamental cause of the low prestige of our legislatures is to be found in their failure to adapt their organizations and methods to modern conditions.

—H. W. DODDS.

#### I. LEGISLATIVE PROCEDURE

"The rules of procedure in the state legislatures have developed in response to four principal influences: the volume of legislation, the number of members, the limitations of time, and the exigencies of the party system."<sup>1</sup> The volume of legislation has enormously increased in recent years. This is indicated by the fact that in 1923 the legislatures of forty-four states in regular or special sessions passed approximately 16,500 acts and resolutions.<sup>2</sup> From 1916 to 1921 a total of 18,662 bills were introduced into the legislature of the State of New York alone, of which 5,680 were passed by both houses.<sup>3</sup> In view of the time required for the organization of state legislatures and the short sessions permitted by most of the states, it is obvious that legislation is poorly framed and too hurriedly passed. One critic cites the example of a legislature that framed and passed eight hundred laws in one hundred and thirty-two days. Of these, approximately one-half were passed in the last fifteen days of the session, or at the rate of thirty a day.<sup>4</sup>

To accomplish such an enormous volume of legislation in such a short time and amidst the rivalry of parties and factions, it has been necessary to adopt rather rigorous rules of procedure relating to the introduction and classification of bills, their reference to

<sup>1</sup> A. N. Holcombe, *State Government in the United States* (Rev. Ed. 1926), 256.

<sup>2</sup> See 50 Am. Bar Assn. *Report* (1925), 475-477.

<sup>3</sup> See *Report on the Judiciary*, Exhibit E, New York Constitutional Convention (1921).

<sup>4</sup> Samuel P. Orth, "Our State Legislatures," 94 *The Atlantic Monthly*, 728-739 (1904).

committees, and their consideration by the committees and the houses.<sup>5</sup> While these rules vary with the states, they are characterized by certain essentials found in all the states. They are adopted by each house at its inaugural session, though as a matter of fact they are, with only slight modifications, the same for successive legislatures. The houses are, however, subject to certain constitutional limitations, free to adopt such rules as suit their convenience and purpose.

In general the procedure of state legislatures follows the general formula of congressional procedure.<sup>6</sup> Bills are framed and introduced by members and referred by the presiding officers of the two houses to the appropriate committees. The committee system is fitted into the classification of legislation, varying with the states. Revenue bills are, of course, first introduced into the lower house. No bill will be considered by either house except on the basis of a report of a committee, which is generally accepted with little or no modification. A regular order of business is provided by a standing rule, which is followed in the consideration of bills in the absence of a special rule or order to the contrary. Bills before being finally passed have to be read three times, and in many states, on separate days. Generally, the first and last reading is by title only. The second reading follows the report of a committee preceding the consideration of the bill by the house. At this stage of procedure, the bill with the amendments adopted by the house, if any, is engrossed and placed on the calendar of bills for third reading. As a rule bills are not amended on the third reading. Debate usually follows the second reading, though in some states it takes place at the third reading.<sup>7</sup> In case of disagreement over the provisions of a measure, a conference committee representing both houses is appointed by their presiding officers to compose

<sup>5</sup> Excellent treatments of legislative procedure are to be found in P. S. Reinsch, *American Legislatures and Legislative Methods* (1907), H. W. Dodds, "Procedure in State Legislatures," 77 *Ann. Am. Acad. of Pol. and Soc. Sci.* (Supplement, May, 1918). A very clear treatment of the committee system is C. L. Smith, "The Committee System in State Legislatures," 12 *Am. Pol. Sci. Rev.*, 607 (1918).

<sup>6</sup> The steps in the procedure of a bill might be listed as follows: (1) preparation of the bill, (2) introduction, (3) first reading and reference, (4) committee consideration and report, (5) second reading, debate, and possibly amendment, (6) engrossment, (7) third reading and final vote, (8) repetition of this process in the second house, (9) possibly consideration by the conference committee, (10) enrollment, signature by the presiding officers of both houses, and presentation to the governor, and (11) action by the governor.

<sup>7</sup> John Mabry Mathews, *American State Government* (1924), 187-190.

their differences. The report of such committee is usually adopted by both houses.<sup>8</sup>

To expedite procedure, it has been necessary to limit the time allotted to debate. This may be done by various methods. "First, limitations may be placed upon the freedom of debate in general. Thus, in most legislative bodies no member may speak twice to a question until all who wish have spoken once. In some bodies no member may speak to any question for more than a prescribed length of time. In all houses there are certain questions to which a member may not speak for more than a prescribed period of time. In the case of a number of questions the prescribed time may be very short, ten, five, or three minutes. Certain motions, particularly the motion to adjourn, are not debatable at all. Secondly, limitations may be placed upon the freedom of debate of particular measures. Thus, a motion may be adopted to fix a time at which the discussion of a pending measure shall be terminated and the vote shall be taken. Finally, in most legislative bodies debate may be terminated at any time by the adoption of the previous question; that is, of the motion that the main question be now put to a vote. The adoption of the previous question puts an end to debate at once, though generally the member in charge of the bill is granted a few minutes in which to make a closing statement before the taking of a vote."<sup>9</sup>

## II. THE PREDOMINANCE OF THE SPEAKER

Without question, the most important figure in the lower houses of the various state legislatures is the Speaker, who is still as czaristic as the Speaker of the House of Representatives was in the days of Reed and Cannon. The most important source of his power is, of course, the power of recognition. No member can secure the floor without his recognition. By ascertaining in advance the purposes for which speakers desire recognition, and by arranging to provide recognition only in a certain order or for certain purposes, he may largely control the course of debate and also of legislation. By consistent refusal of recognition he may reduce able men to inconsequential positions and by the opposite practice elevate others to places of leadership. In states where party lines are sharply drawn the Speaker, like the floor leader, is selected at a majority caucus prior to the convening of the legis-

<sup>8</sup> See Walter F. Dodd, *State Government* (2nd Ed., 1928), 184-186.

<sup>9</sup> Holcombe, *op. cit.*, 258.



lature. The second source of the Speaker's power is derived from his ruling prerogative. Sometimes the fate of a bill depends on a ruling on a technical point of procedure. A Speaker will generally rule in such instances in favor of his party or faction. While the minority may appeal to the house from his ruling, he will likely be sustained for the simple reason that his ruling is in the interest of those who have elected him. It is by means of this power that he enjoys the right to declare the presence of a quorum or to refuse to entertain dilatory and obstructive motions. He is thus the directing agency of his house and can practically drive it along his chosen course.<sup>10</sup> The third source of his power is his right to make appointments. By the appointment of dependable party regulars to places upon the more important committees, and by the relegation of insurgents to unimportant committees, he is able to do much to preserve party discipline and to facilitate the execution of the majority party program.<sup>11</sup> A fourth source of his power is the reference of bills. He is the one authorized to classify bills for reference to committees. Since there is sometimes an opportunity to refer a bill to more than one committee, he may, by referring such a bill to a committee upon which he has a majority obtain a favorable or an unfavorable report as he or his supporters may desire. He may, of course, refer such a bill to a committee that will refuse to report on it. In other words, the bill is killed in the committee room through his influence.<sup>12</sup> The fifth source of his power is his control of the personnel of the committee on rules. "This power does not exist in all state legislatures, and is important only in those where the committee on rules is highly privileged. In general, however, the powers of the speaker are the same in all states. The president of the senate, who is usually the lieutenant-governor *ex officio*, exercises the powers of recognition, ruling, and reference, but does not always make appointments to committees or control the committee on rules.<sup>13</sup> In the senates the most important member is likely to be the floor leader of the majority party."<sup>14</sup>

It may be noted, then, that the legislative assemblies of most of the states are, as far as the limitation of the power of the Speaker is concerned, in much the same situation as the House of

<sup>10</sup> Everett Kimball, *State and Municipal Government in the United States* (1922), 208-209.

<sup>11</sup> The Speaker does not appoint the committees in Nebraska and Utah.

<sup>12</sup> Frank G. Bates and Oliver P. Field, *State Government* (1928), 153.

<sup>13</sup> In many cases the Senates elect their committees.

<sup>14</sup> Holcombe, *op. cit.*, 260.

Representatives of the United States was prior to the revolution of 1910 which restricted the powers of the Speaker. It would be difficult to devise a more partisan agency than the Speaker of the lower houses of the state legislatures. By his power the will of the majority is felt at every stage of the procedure of these houses and legislation in so far as they are involved is a machine product.<sup>15</sup>

### III. THE COMMITTEE SYSTEM OF STATE LEGISLATURES

The committees of state legislatures have on the basis of their powers been grouped into three classes,<sup>16</sup> which may, for purposes of discussion, be designated as (1) the joint committee system, (2) the normal system, and (3) the New York system.<sup>17</sup> The joint committee system has been developed fully in Massachusetts, Maine, and Connecticut. Practically all committees in Massachusetts are joint committees and exercise very few privileges. Bills after introduction are referred to the committees for examination prior to their consideration by either house. The committees give public hearings in which both outsiders and members of either house may participate and members may attend committee deliberations. Committees are forced to report on bills before a fixed day and usually the report is made to the house in which the bill originated. Reports of committees follow a fixed order unless four-fifths of the members of the house to which the bill is reported decide to the contrary.

The advantages of this system are that it coördinates the work of the two houses and saves considerable time. When a bill is reported and passed by one house, it is ready for consideration by the other house without any further consideration by a committee. There are no conference committees following the action of independent committees of each house. Furthermore, those who wish to favor or oppose a measure have to appear before only one committee.<sup>18</sup> Probably the most notable feature is the centralized

<sup>15</sup> For a very illuminating discussion of the manner in which procedural rules may be utilized to insure control of legislative machinery, see Clyde Kelley, *Machine-Made Legislation* (1912).

<sup>16</sup> Holcombe, *op. cit.*, 261.

<sup>17</sup> See J. H. Jameson, "The Origin of the Standing Committee System in American Legislative Bodies," 9 *Pol. Sci. Quar.*, 2 *et seq.* (1894), and C. Lysle Smith, "The Committee in State Legislatures," 12 *Am. Pol. Sci. Rev.*, 607-639 (1918).

<sup>18</sup> See Dodd, *op. cit.*, 181-182; also A. C. Hanford, "Our Legislative Mills: Massachusetts, Different from the Others," 13 *Nat'l. Mun. Rev.*, 40 (1924).

system provided through the committee on ways and means for the consideration of appropriations. "To this committee are referred the governor's proposals on the budget which serve as a basis for the comprehensive general appropriation bill and for the supplementary general appropriation bill. The executive estimates are subjected to careful revision with ample opportunity for hearings. All proposed new legislation entailing the expenditure of public money is also referred to the committee on ways and means, before it is placed on the order of second reading, so that there may be a report on its relation to state finances. Thus, there are two reports on such a measure, one from the committee to which it was originally referred on its general merits, the other from the committee on ways and means on its relations to the state budget plans."<sup>19</sup>

The normal committee system which is found in the great majority of the states works after the fashion of the committee system of the House of Representatives of the United States. It is the agent of the factional or party majority in the houses and is under the dictation of their presiding officers and floor leaders. The committees in this system are practically "little legislatures." They can rewrite the bills that are referred to them, grant or refuse public hearings, kill a bill by refusing to consider it, and report practically at their discretion. They are, particularly the more important committees, highly privileged. Their power to guillotine a bill prevents the houses from having to consider a large amount of unnecessary legislation, but it also enables them to smother a measure that they oppose regardless of its merits or timeliness. It is true that the houses in most of the states have the power by an extraordinary vote to discharge a committee and bring a bill directly before them for consideration, but this in practice is very difficult to do. Since the committees constitute the machine of the majority, they can generally depend on their action being sustained. In fact, they can by informal conferences with the floor leaders and important members of the houses know in advance what the attitude of the houses will be on their reports.<sup>20</sup>

The chairmen of the committees of this system are important agents in the legislative process. They frequently determine whether or not public hearings shall be granted or reports shall be made. They may also in collusion with the Speaker or the presid-

<sup>19</sup> Holcombe, *op. cit.*, 261-262.

<sup>20</sup> Robert Luce, *Legislative Procedure* (1922), 125-148.

ing officer get the reports of their committees made a matter of special order. The presiding officer recognizes the chairman of a committee who moves that his report be heard at an appointed hour. In most of the states a majority vote is sufficient to adopt such a motion. It is very unlikely that the majority will defeat a motion of their leaders. Toward the close of a legislative session when a large volume of legislation is pressing for a hearing, a committee system of this type becomes tyrannical. If it is not able to have its own way, it has the power to defeat the will of the minority. The knowledge of this fact makes opposition useless and tends to leave the system free to accomplish its own purposes.

The conference committee in this system is an especially important cog in the machine. Its membership is composed of carefully selected leaders from the houses whose attitude on the measure under consideration reflects the will of the dominant faction or party. While a report of a conference committee is subject to the approval of both houses, because of political influence and the pressure of time, this matter is almost perfunctory.<sup>21</sup>

The New York committee system is the strongest and most centralized of the three systems. It is practically a copy of the committee system of the House of Representatives of the United States prior to the dethronement of its Speaker. In the New York system, the Speaker in coöperation with the committee on rules of which he is chairman, and with the chairmen of the other committees chosen by the party caucus controls more absolutely legislative procedure than is the case under the normal committee system. Responsibility is fixed and is partisan. From the point of view of the location of power in these systems, it may be said with reasonable accuracy that it is in the Massachusetts system in the hands of the majority, in the normal system in the hands of the committees, and in the New York system in the hands of a few leaders. The majority dictates to the committees in the first, the reverse is true in the second, and a few leaders control both the committees and the majority in the third. The first lends itself to popular government; the second is oligarchical and irresponsible; and the third is partisan and responsible.<sup>22</sup>

<sup>21</sup> This system of committees has found its highest development in Illinois. See Chester Lloyd Jones, *Statute Lawmaking in the United States* (1912), 18-19; "Legislative Procedure in the Forty-Eight States," *Nebraska Legislative Ref. Bur. Bulletin*, No. 3, 217 (1914); and also Leonard D. White, "Our Legislative Mills: The Legislative Process in Illinois," 12 *Nat'l. Mun. Rev.*, 712-719 (1923).

<sup>22</sup> See Woodrow Wilson, *Congressional Government* (1891), 102-104.



"The principal difference between the normal and the New York systems of procedure," says Holcombe, "concerns the relations between the little band of leaders. Under the New York system the leaders are more closely banded together than under the normal system. Committee chairmen are less independent of one another and are more effectively subordinated to the authority of the speaker and the committee on rules. Under the normal system the organization is in control, but it is loosely articulated. Under the New York system the organization is closely articulated. Its decisions may be swiftly formed, and promptly executed. The New York system is consequently more favorable to effective party action."<sup>23</sup>

#### IV. THE RESULTS OF THE PRESENT SYSTEM

In the first place, the individual member is crushed and as a result representative government is practically abolished.<sup>24</sup> "The unprivileged member finds himself a mere cog in a machine, as far as the enactment of legislation is concerned. The more mechanically he performs the duties required of him by the legislative leaders, the more successful he can hope to be in serving the special interests of his own district. A new member especially (and a substantial portion of the membership of every legislative body is always new) is helpless without the favor of the organization."<sup>25</sup> Only a few individuals count in the legislative process. This is due to the size of our legislative bodies, their short sessions, their rules of procedure, and the volume of legislation enacted. The membership of the two houses, if the bicameral system is retained, should be reduced to not more than sixty for the lower house and thirty for the upper; preferably a single house of about forty members elected from large districts by proportional representation should be established. The session should be lengthened and a legislative council established with the powers previously indicated.<sup>26</sup>

The above defects might be overlooked if the legislative output was satisfactory. This is not the case from the point of view of both quantity and quality. The volume of legislation as previ-

<sup>23</sup> Wilson, *op. cit.*, 269.

<sup>24</sup> See, "Is This Representative Government?" 22 *World's Work*, 14,789 (1911).

<sup>25</sup> Holcombe, *op. cit.*, 269.

<sup>26</sup> See Illinois Constitutional Convention Bulletins (1920), *Bulletin* No. 8, 532-533.

ously noticed is entirely too large. Its quality is still less defensible. A large amount of state constitutions and legislation is copied from the constitutions and laws of other states. "It happened to me in the Convention of 1846," said Samuel J. Tilden of New York state, "that an article on corporations had been balloted to and fro without coming to a result satisfactory to anybody; and it was sent to a select committee of which I was chairman. That committee decided on the adoption of one provision that I was unable at that time to understand. I reported it as they ordered, and it became a part of the fundamental law. A short time after that I was passing through Albany, and I heard a very curious discussion in the Senate as to the meaning of that provision. On my returning to New York I met the author of it, and found him as much puzzled as the Senate had been or I had been. But, sir, that article, clause for clause, word for word, and letter for letter stands in the Constitutions of seven different States of the Union."<sup>27</sup> Governor Hodges of Kansas in 1913 gave an example of a law of that state relating to the regulation of hotels which required that "all carpets and equipment used in offices and sleeping rooms, including walls and ceilings, must be well plastered.") There are scores of reasons why such horrible blunders are made. Such laws may be void of principle, faulty in content, or defective in phraseology. Lack of time for proper consideration, ignorance of the law and the needs of society, and the want of technical assistance in drafting and phrasing bills are largely responsible for such failures. Prolivity of the law due to the redundant phraseology of the legal profession and the American predilection for elaborate details makes it exceedingly difficult to state the law in clear and unequivocal terms. The inadequacy, the indefiniteness, and the inaccuracy of words call for expert assistance in phrasing laws. Precision must be secured to such a degree, if possible, as to prevent wilful misunderstanding of the law.

Furthermore, it must be recognized that the volume and character of our legislation is largely responsible for the tremendous burden of litigation under which our judicial system is staggering. The courts generally recognize this. It is also a factor in the breakdown of law enforcement and the constantly increasing cost of government.

Another abuse of the present system is its adaptability to special legislation to the exclusion of the interest of the state and its institutions. The regular sessions of the legislatures are almost

<sup>27</sup> Quoted by Luce, *op. cit.*, 539.

wholly devoted to the consideration of this type of legislation, full of jokers, the handiwork of the expert lobbyists of special and local interests. Governors are forced to call from one to two extra sessions to secure a consideration of the state's business. The lack of some centralized system such as a legislative council to exercise the initiative in legislation and to force a consideration of the interests of the public is the main reason for this abuse. The legislatures are primarily under the direction of the lobby, a sort of unofficial cabinet. There is a legitimate place for the lobby in the public hearing in the committee room, but when a legislature so loses its direction as to submit to the dictation of favor-seekers, it has ceased to be a public institution. "We found," said Elihu Root in 1915 in the Constitutional Convention of New York, "that the legislature of the state had declined in public esteem, and that the majority of the members of the legislature were occupying themselves chiefly with the promotion of private and local bills, of special interests . . . upon which apparently their reelections to their positions depended, and which made them cowards and demoralized the whole body."<sup>28</sup>

## V. THE PROBLEM OF LEGISLATIVE EFFICIENCY

1. *The Form and the Scope of the Powers of the Legislature.* There are at least two major considerations upon which procedural reform must be predicated if it is to be effective. These are (1) legislative reorganization and (2) the restriction of the legislature to its proper place in an efficient and responsible scheme of government. Legislative procedure deals with the mere mechanics of the enactment of law, and, therefore, touches probably the least important side of the problem of legislative efficiency. The problem of reorganization and the limitation of the legislature to somewhat the function of a board of directors by assigning the initiative in legislation to a legislative council representing both the executive and the legislature have been discussed. It needs to be emphasized that the primary function of the legislatures is to act as the organs for the expression of public opinion and not to lose themselves in the haze and mist of administrative details which should be left to executive initiative. Our state legislatures attempt entirely too much and as a result dissipate their energy and time. They should devote themselves to the passing upon policies and the supervision of their execution. The voter is incapable for lack

<sup>28</sup> *Record of N. Y. Const. Conv. of 1915*, 4458.

of time and knowledge to do this and unless his representative performs this task for him government becomes irresponsible.<sup>29</sup> The European practice to look to the executive for initiation of public policy is rapidly gaining recognition in the practice of our national government, but is being more stubbornly resisted in the states. It is difficult to see that this tendency is at all dangerous with the legislature retaining the power of approving, modifying, or rejecting such initiative. Its acceptance would relieve the legislature of a tremendous burden, give it time for a thorough consideration of public policy, and strengthen its control over the executive. The acceptance of executive initiative in legislation is far more safe and defensible under proper supervision than popular initiative.

2. *Procedural Reform.* Undoubtedly the mechanical features of legislative procedure can be improved. The rule that bills must be read on the floor of each house on three separate days is not generally followed, no longer serves a necessary purpose, and should be abolished. It may be used, of course, by obstructionists to force compromises, or bargains, and to defeat measures by virtue of time limits. Some limitation should be placed upon private legislation as a means of giving public bills right of way. Various devices have been suggested for this purpose such as a more rigorous procedure for private bills as in Great Britain, the legislative council, a more definite distinction between public and private bills with the major portion of the session allotted to the former, and the limitation of the number of private bills which a member may introduce. The legislative council under executive leadership seems the most feasible solution of this problem.

The committee system is by no means perfect. There are too many committees due to the large membership of the houses, particularly the lower, and the disposition to create a chairmanship for as many members as possible. The committee system should be adapted to the subject matter of legislation rather than to the membership of the houses. The size of committees is too large for efficiency and expedition for the same reasons. Membership on the more important committees should be exclusive as is the case in Congress. More effective control of committee reports is necessary. Committees should report more promptly to prevent legislative congestion toward the close of the session and to make possible an adequate consideration of legislative proposals. It is also possible for a committee by timing its report to fit the peak point

<sup>29</sup> See W. F. Willoughby, *The Government of Modern States* (1919), 302.



in the legislative rush to prevent the detection of the jokers contained in its report.<sup>30</sup>

A committee for the consideration and correcting of all bills in the third reading before their final passage is a device in the committee system of Massachusetts that seems worth commending. This committee under the bicameral system should be a joint committee with an expert secretary. It could correct faulty phraseology, prevent duplication, and eliminate unconstitutional provisions. If material changes were desirable, they should be reported to the two houses for consideration.<sup>31</sup>

3. *Expert Assistance in Lawmaking.* The legislative process has been very appropriately said to include four steps: (1) the selection of the subject matter of legislation, (2) the gathering of the information on which to base legislation, (3) the drafting of bills, and (4) their consideration and enactment into law.<sup>32</sup> While all of these steps are necessary and closely related, they are at the same time sufficiently different in character to require different training for their successful performance. Strictly speaking, only the last is legislative in character; the others are preliminary. Our legislatures could perform the last much better if they were relieved of the details involved in the preliminary steps. It is true that these preliminary steps are now largely performed by party agents, lobbyists, and their experts—all unofficial and irresponsible agents. This is a further reason for the large volume of legislation, its irrelevance to the needs of the public, and the consequent criticism of legislatures.<sup>33</sup>

The legislature should have its own agents under its own direction to perform these investigational and technical functions.<sup>34</sup> If the stubborn fact could be recognized that nowhere—either in Europe or in the United States—are these details handled by the legislative body as a whole, then it would seem that it would be relatively easy to persuade our legislatures to make definite provision for this work as has been done elsewhere. To assign this work to especially provided expert agencies under legislative direction and control would not unpopularize the legislative process or prevent any individual or organization from having a hearing or making suggestions, nor would it rob the legislatures of any of

<sup>30</sup> *Illinois Constitutional Convention Bulletins*, No. 8 (1920), 562-565.

<sup>31</sup> *Ibid.*, 568.

<sup>32</sup> Holcombe, *op. cit.*, 276-281.

<sup>33</sup> See E. L. Godkin, "The Decline of the State Legislature," *Unforeseen Tendencies in Democracy* (1898), *passim*.

<sup>34</sup> Luce, *op. cit.*, 175-180.

their powers. It would, indeed, extend their control over the initial steps in legislation.

Fortunately there is a tendency in this direction but as yet it has been entirely too circumscribed in its achievements. Several legislative reference bureaus and drafting agencies, both public and private, have been established.<sup>35</sup> There should be established at each state capital in connection with the state library a legislative reference bureau composed of research and legal experts appointed by a board consisting of the Governor and two members from each branch of the legislature (if it be bicameral) or four members of a unicameral legislature whose duty it should be to work under the direction of the proposed legislative council in the gathering of materials and information on state legislation and to draft all proposed bills.<sup>36</sup> The reference bureaus that have been established have rendered very valuable assistance to both the legislatures and administrative agents. They are particularly fitted to make such investigations as may be needed and to aid in revising the laws.<sup>37</sup> The elimination of the technical shortcomings, inconsistencies, and ambiguities of our statutes is peculiarly a problem for experts "There is hardly any kind of intellectual work," said John Stuart Mill, "which so much needs to be done, not only by experienced and exercised minds, but by minds trained to the task through long, and laborious study, as the business of making laws."<sup>38</sup>

These bureaus render essentially two types of service: (1) legislative reference service and (2) drafting service.<sup>39</sup> A Committee of the American Bar Association appointed to investigate and evaluate the services of these agencies said: "The legislative reference service, now actually carried on in several States, demonstrates that it is entirely practicable to collect, classify, digest, and index, prior to a session of a legislature, all kinds of material bearing on practically all subjects likely to become subjects of actual legislation at the session. This material, where the bureau is well run, includes not only books and pamphlets, such as might be found in an ordinary library, but also copies of bills introduced

<sup>35</sup> C. G. Haines and B. M. Haines, *Principles and Problems of Government* (Rev. Ed., 1926), 323-328.

<sup>36</sup> See Ernest Freund, *Standards of American Legislation* (1917), *passim*.

<sup>37</sup> Gustavus A. Weber, *Organized Efforts for the Improvement of Methods of Administration in the United States* (1919), 313-364.

<sup>38</sup> *Representative Government*, Ch. V.

<sup>39</sup> It seems best to concentrate both of these services in a single bureau as has been done in Wisconsin, Indiana, and Pennsylvania. See J. H. Leek, *Legislative Reference Work: A Comparative Study* (1925), *passim*.

into the various State legislatures and laws which have been enacted in this and foreign countries, and other printed materials relating to the operation of such laws or the conditions creating a need for them. Indeed, on most subjects of possible legislation, the difficulty is not to find material, but to arrange the large mass of available material so as to make its efficient use practical. That such service has great possibilities of usefulness is evident, especially where the service is directly contributory to the drafting service, a matter to be presently explained. The increasing complication of our industrial, social, and governmental administrative problems renders it necessary, if the discussion of matters pertaining to legislation is to proceed in a reasonably intelligent manner, that systematic effort be expended on the collection and arrangement of material bearing on current matters of public discussion likely to become the subject of legislative enactment. A central agency to furnish such service does not take the place of special commissions or committees created to investigate particular subjects and recommend legislation. The object of the central reference service should be to assist such bodies, as well as individual members of the legislature and others desiring information pertaining to subjects of legislation.

Existing agencies also demonstrate that it is possible to provide expert drafting service for the more important measures and some assistance in the drafting of all bills introduced. The number of bills, for which expert drafting assistance can be furnished, would appear to be merely a question of the size of the force and the amount of the appropriation for its support. Your committee, therefore, believes that it is entirely practical to establish, in connection with any legislature, a permanent agency capable of giving expert drafting assistance for all bills introduced, and they urge the Association to place itself on record as favoring such an agency as the most practical means of bringing about scientific methods of legislation; that is to say, methods of drafting statutes which will secure:

1. Conformity to constitutional requirements.
2. Adequacy of the provisions of the law to its purpose.
3. Coördination with the existing law. And
4. The utmost simplicity of form consistent with certainty.<sup>40</sup>

<sup>40</sup> 38 *Am. Bar Assn. Rep't*, 623-624 (1913).

## CHAPTER XXXIV

### THE STATE EXECUTIVE

A feeble Executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution; and a government ill-executed, whatever it may be in theory, must be in practice a bad government.—ALEXANDER HAMILTON.

#### I. THE DEVELOPMENT OF THE STATE EXECUTIVE

Certain very definite tendencies may be noted in the development of the state executive during the early years of our national history. Popular experience with the somewhat autocratic and tyrannical governors of the colonial period clearly was responsible for the distinctly subservient position which the early state constitutionalists created for the state executive heads.<sup>1</sup> With the coming of the Jacksonian era, however, the old order changed. As "the common man came into his own, and democracy propped its feet on the table in the White House,"<sup>2</sup> there came to be a popular distrust of legislative bodies, and a reëmphasis upon the importance of the executive. As a result state governmental organization was reconstructed with two objects in view. The first of these was the establishment of executive independence of the legislature; the second, the disintegration and decentralization of the executive. The principal executive officers came to be elected directly, and were thus able to secure a degree of independence from the legislature which would have been practically impossible under the former plan of legislative election. The abolition of executive councils, chosen by the legislatures from among their own members, further developed the independence of the executive. But with the same gesture the constitutionalists made the principal executive officers separately and independently directly elective, rendering them not only independent of the legislature but almost completely independent of each other. The governor, secretary of state, attorney-general, and all other members of the

<sup>1</sup> See *Illinois Constitutional Convention Bulletins*, No. 9 (1920), 623-625.

<sup>2</sup> See Don Seitz, *The "Also Rans"* (1928), 228-254.



executive became supreme, each in his own particular sphere of administrative action; all became independently and equally responsible to the electorate. In brief, the state executive branch became what has come technically to be designated as the plural executive.<sup>3</sup>

Such a system of executive decentralization and disintegration could have but one effect upon the chief executive, the governor. He became merely the nominal and apparent head of the executive branch of the government; in fact, he was little more than one among equals. At the same time, however, the development of the party system made the governor without question the preëminent party leader holding public office in the state government. The rank and file of the party depended on the governor to redeem that "irreducible minimum" of promises in the party platform, despite his lack of administrative control over the rest of the executive branch. The governor was, indeed, in a compromising position. He was held responsible for the character of his administration, but lacked the power to influence either the determination or execution of its policy. The actual extent of his plenary power in law enforcement and administration consisted in calling out the militia for such purposes, a step far too drastic for ordinary purposes. The only way in which he might otherwise control the executive was through specific mandatory legislation. The solution was inevitable; the legislative prerogatives of the chief executive became vastly enlarged. The governor was transformed, in effect, from a chief executive into a chief legislator for the state.<sup>4</sup>

The transformation which the office of governor thus underwent left as the only unifying influence among the members of the executive that of common political allegiance. This influence was adequate enough to secure combination and coöperation toward reelection, but hardly sufficient for the purposes of coördinated administrative effort. "State . . . administrative officers might form rings for their mutual political benefit, but they rarely formed rings for the benefit of the public. Under such circumstances the party could serve as an instrument of administrative organization only in so far as there was an extra-legal party organization to which partisans in public office could be held

<sup>3</sup> See A. N. Holcombe, *State Government in the United States* (Rev. Ed., 1926), 289 *et seq.*

<sup>4</sup> In states where the veto power reached its fullest development, a governor gifted with the qualities of leadership was not only a member, but the most powerful single member, of the legislative branch of the government." Holcombe, *op. cit.*, 291.

responsible. The leaders of the party organizations, the 'bosses,' whether or not also the occupants of the principal executive offices, were the men who could exert most influence upon the course of administration. But such influences were more commonly exerted for private than for public ends."<sup>5</sup>

Certain contemporary tendencies also may be noted which logically point in the direction of administrative reorganization and centralization. The first of these was the new impetus to state corporate activity and enterprise as a result of the construction of the Erie Canal and the refusal, after the induction of the Jacksonian régime, of the federal government to make further expenditures for internal improvements. The second was the development of new forms of industry and of industrial organization,—banking and insurance, railroading, and the supply of monopolistic commodities of all kinds—necessitating the protection of the individual from irreparable fraud and oppression by centralized administrative regulation and control. The advancement of science and scientific procedural methods created a demand for the expert in public service which the decentralized and disintegrated system did not afford. Finally, the progress of civilization brought an increased consciousness of social responsibility for the care of defectives, dependents, and delinquents.<sup>6</sup> In spite of this, however, state government, particularly the executive branch, remained decentralized, disintegrated, and more or less demoralized for the ensuing three-quarters of a century.

## II. THE ELECTION, TERM, AND COMPENSATION OF THE GOVERNOR

The governors of the Crown colonies were, of course, royal appointees; in the proprietary colonies they were appointed by the proprietors, and in Connecticut and Rhode Island they were elected by the legislatures. The latter plan was preserved in most instances in the transition from colonies to states. The Jacksonian era, however, inaugurated the principle of popular election, and at the present time the governor is popularly elected in every state except Mississippi.<sup>7</sup> Nomination is, of course, on a partisan basis, and may be accomplished either by statewide direct primaries or by state party conventions, composed of delegates from the vari-

<sup>5</sup> Holcombe, *op. cit.*, 291-292.

<sup>6</sup> Everett Kimball, *State and Municipal Government in the United States* (1922), 131-132.

<sup>7</sup> Popular election combined with legislative action in Mississippi. See Constitution of Mississippi, Art. V, Sec. 140.

ous subordinate areas.<sup>8</sup> If a plurality elects, there is but one election; if a majority is required as is the case in a few states and no candidate receives a majority, the legislature in joint session elects a governor from the two highest candidates. In all the states the legislature elects in case of a tie vote.

At the present time two- and four-year terms are about equally common; New Jersey, the only variant from this rule, elects every three years. There is a decided tendency at the present time, however, for a four-year term for the executive.<sup>9</sup> In several states the governor may not immediately succeed himself; the general rule, though, permits at least two terms. The salary of the governor is either fixed by constitutional provision or placed at the determination of the legislature; in the event that the second plan is followed, that body usually is prohibited from reducing his salary during his term of office. Salaries vary from \$25,000.00 in New York, \$18,000.00 in Pennsylvania, \$12,000.00 in Illinois, \$10,000.00 in five other states down to about \$3,000.00. Apparently governors do not run for office because of the adequacy of the legitimate financial returns. Sometimes illegitimate financial considerations are a factor and often the use of the gubernatorial office for further political promotion is an incentive. The governorship has frequently been a political ladder to the United States Senate or the Presidency. A candidate must always, of course, be a citizen of the United States; in addition most states impose a minimum residence requirement of five years within the state, and also a minimum age requirement of thirty years. In the event of the death, resignation, or removal from office of the governor, or his absence from the state, the lieutenant-governor, if there is such an officer, succeeds him.<sup>10</sup> In case the governor has been recalled, however, the candidate who polled the highest vote at the recall election succeeds to the office of governor. The succession in the event of the death of the lieutenant-governor, or his resignation while occupying the governorship, or of impeachment or absence, follows procedure laid down in the state constitution or statutes, passing usually to the president of the senate and thence to the speaker of the house.

<sup>8</sup> See E. M. Sait, *American Parties and Elections* (1927), 377-399.

<sup>9</sup> South Carolina in 1924 increased the governor's term to four years.

<sup>10</sup> Thirty-five states have lieutenant-governors; in the other states the constitutions make provision for succession. The secretary of state or the president of the senate usually succeeds. J. Q. Dealey, *Growth of American State Constitutions* (1915), 164.

## III. THE GOVERNOR AS CHIEF EXECUTIVE

During the earlier expansion of the corporate activities of state governments, the newly created boards, commissions, and administrative officers usually came to office by popular election, or legislative selection. The limit of such decentralization was soon reached, however, and through a process of gradual evolution the appointing power of the governor experienced appreciable accretion. Curiously enough, this expansion did not bring a corresponding development in the administrative importance of the chief executive. There were several reasons for this: first, his appointive and removal power was not made at all commensurate with his nominal responsibility for the affairs of the administrative department; second, the majority of the states restricted the governor's power through unduly brief tenure; third, the state administrative services were not correlated and integrated into a single harmonious system.<sup>11</sup>

The power of appointment and removal, indispensable as it is for the proper direction and control of the administrative officers of the government, has never been fully conferred upon the governors of the states. According to an investigation of the state government of New York, made in 1915, there were at that time, in addition to popular election, about sixteen different ways of appointing the heads of administrative departments, bureau chiefs, commissioners, and other principal officeholders.<sup>12</sup> A small minority of these were appointed exclusively by the governor with the advice and consent of the senate. New York elects only the governor and three other state officials. In most other states the number of elective departments heads is much greater.

The tenure of office of administrative officials offers almost as much variance as the modes of appointment. Rarely do the terms of important appointive officials other than department heads coincide with the governor's tenure. The result is, of course, that each incoming administration retains within its organization some of the hold-overs from the previous administration. Again, these officers are removable, for the most part, by impeachment, although "ripper"<sup>13</sup> legislation has been utilized in some instances.

<sup>11</sup> W. F. Dodd, *State Government* (2nd Ed., 1928), 229-230. See also *Illinois Constitutional Convention Bulletins*, 687-295 (1920).

<sup>12</sup> See New York Bureau of Municipal Research, *The Constitution and Government of the State of New York* (1915), Charts i, ii, iii, and iv.

<sup>13</sup> That is, destroying the office by legislative enactment in order to get rid of the incumbent.



Some may be removed by the governor at will, some upon charges preferred by the governor upon hearing by the senate, some after public hearing, others by methods not subject to the control of the governor; there are, in fact, seven ways other than impeachment by which officials may be removed. Considerably less than half, however, are removable by the governor at his own discretion.<sup>14</sup> "With the adoption of the practice of electing the principal executive officers directly by the people, with the general acceptance of the doctrine of checks and balances and the consequent transfer to the state senates of the authority to confirm nominations to inferior offices, so far as these were not vested in independent department heads, the governor's power of appointment declined to a minimum. Under such conditions the maxim, 'To the victor belongs the spoils,' was more than a candid confession of faith by politicians flushed with success at the polls. It was a fair statement of the normal operation of the constitutional arrangements for filling administrative offices under the state government."<sup>15</sup>

It follows from the failure of the state constitutionalists adequately to equip the chief executives with the authority essential to command the obedience and coöperation of the chief executive officers that centralized executive responsibility and coördination are at a nullity. This condition is further aggravated by the minute statutory provisions governing administrative procedure; the result has been, in effect, to permit the governor to exercise only enumerated and specifically granted powers. He has, however, certain minor and miscellaneous functions. The power to grant paroles, commutations, pardons, and reprieves is one of these;<sup>16</sup> in some states, however, a board is associated with the governor in the exercise of this power.<sup>17</sup> The governor is also an ex-officio member of countless boards and commissions, and is the titular head of the state, representing it in all relations with the other states and the national government. Ultimately, most of the governor's time is consumed in matters of inconsequential detail and in gracing social and civic occasions.<sup>18</sup>

<sup>14</sup> See Alonzo H. Tuttle, "Removal of Public Officers from Office for Cause," 3 *Mich. Law Rev.*, 290, 341 (1905).

<sup>15</sup> Holcombe, *op. cit.*, 298.

<sup>16</sup> J. D. Barnett, "The Grounds of Pardon," 18 *Jour. Crim. Law and Criminology*, 490 (1927); also E. Morris, "Some Phases of the Pardoning Power," 12 *Jour. Am. Bar Ass.*, 183 (1926).

<sup>17</sup> The exercise of these powers offers an opportunity for considerable graft and the breakdown of the enforcement of criminal law.

<sup>18</sup> M. C. Alexander, "The Development of the Power of the Executive in New York," *Smith College Studies in History* (1917), 148 *et seq.*; also

## IV. THE GOVERNOR AS CHIEF LEGISLATOR

By far the most effective instrument in the hands of the governor by which he wields influence over state legislatures is his power of veto. There are to be distinguished generally three sorts of veto: first, the block veto, by which the governor either accepts or rejects the measure in toto; second, the item veto, by which the governor may strike out certain items in a bill; and third, the pocket veto, which, on the basis of the federal analogy, was adopted in many states. The pocket veto simply means the failure of the executive to sign bills submitted within the last ten days of the session of the legislature. This practice, due to the limits placed upon the length of the legislative sessions, has practically been discarded.<sup>19</sup>

Statistics indicate that the governor's veto power is used extensively and effectively. "In 1923, when forty-four legislatures met in regular or special sessions," says Holcombe, "more than eleven hundred separate bills and more than one thousand parts of bills were disapproved by the executive. In the forty-four states, about seven per-cent of the total number of bills submitted to the governor were vetoed, not including the bills which were negatived in part. . . . Vetoes are in general effective. In 1923 there were only eleven states out of the forty-four in which any bills or parts of bills were passed over the governor's veto. Out of a total of more than eleven hundred bills disapproved, 104, or 9 per cent, were overridden by the legislatures; out of the 1041 parts of measures negatived, 40, or about 4 per cent, were restored by the legislatures." <sup>20</sup>

The effectiveness of the gubernatorial veto has produced a certain amount of coöperation on the part of the legislature with the governor. Many bills toward which the governor is known to be unfavorable will be amended in the hope of gaining executive approval. Bills which have passed both houses and have gone to the governor frequently are recalled by joint resolution—with the

A. E. Smith, "How We Ruin Our Governors," 10 *Nat'l Mun. Rev.*, 277 (1921).

<sup>19</sup> At the present time most state constitutions provide that measures submitted to the governor become law unless vetoed in from five to thirty days after the close of the session. Holcombe, *op. cit.*, 317.

<sup>20</sup> *Op. cit.*, 316-317. It should be noted that four states in which there was pronounced lack of harmony between executive and legislature contributed 85 out of the 104 unsuccessful vetoes: Kansas, Maine, New Jersey, and Ohio.

governor's suggestions—in order to avoid the veto. Legislators frequently trade measures with the governor, supporting executive bills in order to avoid the veto of private and local bills in which they are particularly interested. Not infrequently proponents of certain legislation advise with the governor even before the measures are introduced in the legislature.<sup>21</sup> All of this necessarily has brought about a fundamental change in the conception of the governor's office. He was originally given the veto to defend himself against legislative encroachment; he is now expected to remedy the defects of the legislative branch arising from inadequate organization and procedure.<sup>22</sup> Whereas originally the upper and lower houses were supposed to check and balance each other, that function has been almost entirely transferred to the executive;<sup>23</sup> originally, the utilization of the veto to control legislation not directly related to the interests of the governor was entirely secondary,<sup>24</sup> but now few vetoes are used in the defense of his constitutional prerogatives.<sup>25</sup>

More important, however, has been the development of the item veto, particularly with reference to fiscal legislation.<sup>26</sup> In the earlier part of the nineteenth century, and, indeed, until comparatively recent years, the prevailing political philosophy compelled the vestment of fiscal control, subject to the general executive veto, in the hands of the legislature. In a number of states certain expenditures, such as the salaries of the members of the legislature, the executive, and the judiciary, were constitutionally mandatory. Other appropriations were in some instances limited to two years; frequently, however, permanent or continuing appropriations were made for the principal objects of expenditure, and special appropriations for private and local objects were made without any limit of time. With these exceptions, appropriations for general

<sup>21</sup> J. H. Finley and J. F. Sanderson, *American Executive and Executive Methods* (1908), Chs. V-IX; and J. A. Fairlie, "The State Governor," 10 *Mich. Law Rev.*, 370-383, 458-475 (1912).

<sup>22</sup> It is a matter of common knowledge that at a single session legislatures frequently pass bills diametrically opposed, create several commissions to do exactly the same things, and pass duplicate bills. The California legislature recently passed opposing bills in order that the governor might take his choice. See P. S. Reinsch, *American Legislatures and Legislative Methods* (1907), 284.

<sup>23</sup> D. L. Colvin, *The Bicameral Principle in the New York Legislature* (1913), 112.

<sup>24</sup> See *The Federalist*, No. 73.

<sup>25</sup> J. A. Fairlie, "The Veto Power of the State Governor," 11 *Am. Pol. Sci. Rev.*, 473-494 (1917).

<sup>26</sup> J. D. Barnett, "The Executive Control of the Legislature," 44 *Am. Law Rev.*, 215-384 (1910).

governmental purposes usually expired with the close of the fiscal year, and unexpended balances, if any, reverted to the treasury. Since department heads were almost entirely independent, and reported separately to the legislature upon the expenditure of its appropriation and its estimated expenditures for the future, correlated administration and budget formation were impossible. The budget as it finally reached the legislature was simply a collection of departmental estimates, usually padded to the extent of the credulity of the legislative branch, and, for the most part, bearing little or no relation either to the needs of the administration as a whole or to each other. This system inevitably bred extravagance of the grossest sort, and it is not at all surprising that the strong arm of the governor who was willing to use the veto power was welcomed as a means of regulating such an utterly irrational and unbusinesslike procedure. The item veto, serving most efficiently these ends, generally was adopted. While it originally was intended to check simply unconstitutional appropriations rather than to restrain excessive expenditures, governors, in response to general demand, have been compelled to use the veto in order to keep the state government within its income. In 1910 the governor of New York reduced the budget thirteen times as much as the reductions effected by the senate upon the appropriations as they were made by the lower house.<sup>27</sup> In 1914 in the same state the governor vetoed fifteen per cent of the total amount appropriated by the legislature.<sup>28</sup> In Pennsylvania the governor in 1885 showed the politicians a new kink by reducing the appropriations for specific items; this plan gained much popularity. In the same state in 1913 the governor vetoed almost a fourth of the total amount appropriated by the legislature.<sup>29</sup> This plan has, however, enabled the legislatures to embarrass the governor by making exceedingly liberal appropriations and letting him shoulder the responsibility for their reduction.<sup>30</sup>

The item veto considered in its most favorable light is only a palliative. "The mere fact that there is an increasing number of states which are giving the governor the power to veto items in appropriation bills is indicative of a condition demanding change.

<sup>27</sup> Colvin, *op. cit.*, 113.

<sup>28</sup> E. E. Agger, *The Budget in the American Commonwealths* (1907), Chs. II, III.

<sup>29</sup> R. H. Wells, "The Item Veto and State Budget Reform," 18 *Am. Pol. Sci. Rev.*, 784 (1924).

<sup>30</sup> J. M. Mathews, "The New Rôle of the Governor," 6 *Am. Pol. Sci. Rev.*, 216 (1913), and "The New Stateism," 193 *North Am. Rev.*, 808-815 (1911).



Inasmuch as the finances in our states call for more systematic attention and centralized and responsible control, sound public policy requires that effective measures be adopted for giving the governor a power over the budget which is commensurate with the present responsibility really vested in him as the chief 'executive' by popular opinion. Nothing short of a thoroughgoing treatment of the subject which will impose on the governor the duty of formulating, submitting, and defending money measures will solve the problem of securing economy and responsibility in the appropriation and management of public funds."<sup>31</sup> Responsibility without power is irresponsibility.

The vote required to overcome the executive veto varies; but the effectiveness of the veto is not to be measured by this means. A majority of the quorum in each house will override the governor's disapproval in Connecticut; elsewhere a majority of the full membership of both houses is required. Of this latter group five states require a three-fifths majority, several two-thirds majorities, based either on the number present or the total membership; the rest require simple majorities on one of the above bases. The fact remains that, inasmuch as the vast majority of bills are passed at the close of legislative sessions, the governor really sits, after the close of the session, as a third and final body of the legislative branch of the government.

"Broadly speaking, there are three types of state governor. First, there are those who humbly accept the leadership of the heads of the party organization and dutifully perform their part in the operation of the 'machine.' Secondly, there are those who recognize the power of the organization but treat the boss as an associate rather than as a master. Thirdly, there are those who seek themselves to become bosses."<sup>32</sup> Regardless of the particular type of governor, there is always patronage to be distributed. And the distribution of patronage is probably the second most important legislative power of the governor. It may be that his legislation is dictated by the machine, in conjunction with the machine, or on his own initiative if he be powerful enough; certain it is that the patronage at his disposal will be used in passing executive measures. When governors speak in terms of patronage which either they or the party leaders control, their language, even though it is dignified, is understood by the legislators and com-

<sup>31</sup> *The Constitution and Government of the State of New York* (1915), 77-78.

<sup>32</sup> Holcombe, *op. cit.*, 301.

mands their respect under almost any circumstances.<sup>33</sup> Minor administrative appointments under the present decentralized system are made only ostensibly by the department head, who is generally a proxy of the machine and approves its selections for his subordinates. Neither are they made on the basis of ability or efficiency; most often the ultimate consideration for such appointments is the support of the executive on the part of one or several members of the legislative department.<sup>34</sup>

All state constitutions require, of course, the issuance of messages on the part of the governor to the legislature, informing them of the condition of the state.<sup>35</sup> These messages are not generally intended for those to whom they are addressed; they usually seek to reach the electorate at large and precipitate pressure on the legislators in the hope of securing the passage of measures about which the executive is doubtful. If the governor's machine is efficiently organized, his messages will likely be of primary importance in the shaping of the legislative policy. Oftentimes they represent purely and simply the measures which he wants passed, and, in view of his influence through the patronage and the veto, his wishes are generally not inadvisedly disregarded.

Probably about as important as the message power in procuring legislative action of a specific type is the power of the governor in most states to convene the legislature in special session.<sup>36</sup> The fact that legislatures generally are restricted to one biennial regular session of sixty or ninety days has made special sessions necessary, and has greatly increased the legislative influence of the governor since he is quite generally empowered to determine the agenda of the extraordinary meetings of the legislature. Thus, by specifically indicating certain topics for consideration, he is able to force a discussion of his measures and frequently their favorable consideration. Due to the fact that the American mind thinks, for the most part, in quantitative terms, the legislature must produce concrete

<sup>33</sup> E. M. Sait, "Participation of the Executive in Legislation," 5 *Acad. of Pol. Sci. Proceedings*, 127-140 (1914).

<sup>34</sup> For an interesting chronicle of how such a system operates, see *Autobiography of Thomas Collier Platt* (1910), 374-375 (Ed. by E. J. Lang).

<sup>35</sup> See in this connection B. Y. Berry, "The Influence of Party Platforms on Legislation in Indiana," 17 *Am. Pol. Sci. Rev.*, 51 (1923).

<sup>36</sup> In 1923 Oklahoma adopted a constitutional amendment permitting the legislature, by majority petition, to convene of its own motion in special session. The state supreme court subsequently declared the amendment unconstitutional on procedural grounds. See *Simpson v. Hill et al* (1927), 263 S. W. 635. Also A. J. Lien, "Convening the Special Session—Oklahoma's Predicament," 17 *Nat'l. Mun. Rev.*, 139 (1928).

measures at each session. Such special sessions serve to focus popular attention upon more or less crucial issues, not infrequently having the effect of whipping recalcitrant members of the machine into line and in solidifying the political leadership of the chief executive.

Undoubtedly, one of the strongest factors tending to increase the governor's influence in legislative affairs has been the extension of his jurisdiction to fiscal legislation through the somewhat widespread adoption of the executive budget. This became necessary because of the ineffectiveness of the item veto, the extravagance of the legislature, and the irresponsibleness of the system. A general retrenchment touching all the activities of the government in a constructive and equitable manner could not be effected by the disapproval of one of a half dozen appropriation bills or of a few items in such bills. Furthermore, since appropriation bills were generally passed at the close of a session, the governor could not veto them without frequently crippling or even suspending the operation of important governmental agencies. Moreover, it was seen that the financial policy of a government is inseparable from its program of activities and that executive initiative is as necessary in the former as in the latter.<sup>37</sup>

In view of these conditions many states have imposed upon the chief executive the responsibility for the construction of the program of governmental expenditures. From the standpoint of assuring ultimate legislative domination by that official, no other move could have been quite so effective. It is now thoroughly within the gubernatorial prerogative to plan, in its entirety, the financial program of the government of these states; the result has been that he has been able practically to dictate the course, tone, and in many instances the actual verbiage of a very large portion of the legislation. The legislature has, of course, the right to revise the budget submitted; in many cases it may introduce additional appropriation bills. Over such measures, however, the governor retains his right of scrutiny and item veto. In consequence, while the governor may not secure the enactment of his original program by the legislature, in the form in which it was offered, he is able, through his power of bargaining, patronage, and veto, effectually to determine the state's fiscal program.

The more important consequences of this reform have probably been the extension of the governor's influence beyond the

<sup>37</sup> R. H. Wells, "The Item Veto and State Budget Reform," 18 *Am. Pol. Sci. Rev.*, 784 (1924).

scope of fiscal legislation. It is quite obvious that, with the power of fiscal initiative, the governor may largely control the legislature in regard to almost any measure of a non-financial character. If he wants a merit civil service system, he has merely to suggest that fact to those needing local appropriation. This principle is applicable in almost any other field of legislation. In other words, the trading stock of the governor has been greatly increased by the acquisition of the initiative in budgetary matters.<sup>38</sup>

## V. MISCELLANEOUS EXECUTIVE OFFICERS

The constitutions of approximately thirty-five of the states provide for the election of a lieutenant-governor. His only duties are, as a rule, to succeed the governor in the event of that official's death, absence, disability, or impeachment. "From this it is apparent that his executive functions are not actual but potential while his normal duties are those of a legislative character."<sup>39</sup> He presides over the senate; in certain cases has the right to participate in debate; except in Michigan he may cast the deciding vote in the case of a tie; and not infrequently is an *ex-officio* member of the governor's council. On the whole, the powers of the office are insignificant, and it is not infrequently used as a reward for worn-out political war-horses or as a means of pigeonholing an uncontrollable individualist in the front ranks of the political party, much after the fashion of the vice-presidency of the United States.<sup>40</sup>

Of far more importance is the office of attorney-general; all states provide for such an officer and he usually is elected by popular vote.<sup>41</sup> He occupies always an important place in the general conduct of administrative affairs, being both chief state prosecutor and, since most state supreme courts refuse to render advisory opinions, the legal adviser of the governor and the department heads. His power as public prosecutor is considerably curtailed at the present time by virtue of extensive statutory delegations of such power to county and district prosecutors, who are completely removed from his jurisdiction. Due to the volume and in-

<sup>38</sup> See Harry Barth, *Financial Control in the United States with Emphasis on Control by the Governor* (1923), *passim*.

<sup>39</sup> Holcombe, *op. cit.*, 391.

<sup>40</sup> See C. Kettleborough, "Powers of the Lieutenant-Governor," 11 *Am. Pol. Sci. Rev.*, 88-92 (1917).

<sup>41</sup> In New Jersey, New Hampshire, and Pennsylvania he is appointed by the governor; in Maine by the legislature; and in Tennessee by the judges of the Supreme Court.



tricacy, as well as the general character, of legislation his advisory functions have come to be of primary importance. His opinions are implicitly accepted by the heads of administrative departments for guidance through the maze of statutory pronouncements affecting their work. "Where the conduct of administration is prescribed by law with infinite and not always intelligible detail, as is the practice in most states, the department heads may be more dependent upon the opinions of the attorney general than upon those of the governor himself."<sup>42</sup> The position of the attorney-general is, at the present time, not one of great dignity with reference to the executive authority of the state. However, the office is often a proving and recruiting ground for gubernatorial timber. Not infrequently men go into the governor's office on the basis of records made as attorneys-general.

Every state has also a secretary of state, which official usually is popularly elected.<sup>43</sup> As originally conceived the functions of the secretary of state comprised those which are, for the most part, at the present time divided between the governor's private secretary and the clerks of the legislative houses. At present he is vested with functions of a varied and miscellaneous sort, usually of a most perfunctory character. He is generally charged with numerous duties relating to the conduct of elections, the printing and distribution of public documents, the supervision of corporations, including the issuance of writs of incorporation and the enforcement of blue-sky laws, issuance of automobile licenses, and the custody of public records. Like other executive officers, he is frequently called into service as an *ex-officio* member of boards and commissions. Unlike the attorney-generalship, however, the office is almost entirely ministerial in character and requires the exercise of little discretion; many women are found in this office. The office generally rests upon "a constitutional pedestal" and, therefore, can only be included in reorganization programs by constitutional amendment.<sup>44</sup>

Treasurers are provided in all states, their functions being purely clerical. They receive and record revenues accruing to the state and pay out those funds on order of the proper authorities, for objects authorized by law. They are popularly elected except

<sup>42</sup> Holcombe, *op. cit.*, 392.

<sup>43</sup> In Delaware, Maryland, New Jersey, New York, Pennsylvania, Texas, and Virginia he is appointed by the governor with the approval of the senate. In Maine, New Hampshire, and Tennessee he is chosen by joint action of the two houses of the legislature.

<sup>44</sup> Kimball, *op. cit.*, 150; Dodd, *op. cit.*, 226-227; Holcombe, *op. cit.*, 393.

in Maine, Maryland, New Hampshire, New Jersey, and Tennessee where they are chosen by the legislature, and in Virginia where in 1928 appointment by the governor was authorized.<sup>45</sup>

In the fiscal department of state government the auditor or comptroller found in all states except three<sup>46</sup> occupies a far more prominent position. Not only is his countersignature required for the payment of all claims against the state, but he is charged with auditing the accounts of all state officers having the power to collect and disburse public moneys. He is popularly elected except in New Jersey and Tennessee where he is selected by the legislature; in Wisconsin and Oregon where the secretary of state is *ex-officio* auditor, and in New Hampshire where the duties of the auditor are performed by a committee appointed by the governor from the executive council.<sup>47</sup>

The state superintendent of public instruction stands at the head of the department which has, thus far, most successfully extended its power of administrative supervision over the whole state. This officer supervises the administration of the school laws, apportions the school fund, conducts investigations, and is responsible to the legislature for general educational affairs. He is usually elected, although appointed by the governor in eight states and by state boards of education in eight.<sup>48</sup> Either of the latter methods is preferable to the first, though selection by an appointive state board of education is possibly most desirable.

The remaining state administrative agencies encountered in one or several of the states are so diverse as to preclude the possibility of enumeration or of functional classification. Among the more important of these agencies may be listed fire marshals or commissioners, boards of examiners, boards of censors, athletic commissions, racing commissions, election boards, railroad, banking, insurance, and game commissioners. They are generally detached administrative agencies of an industrial, scientific, or supervisory character specially created to direct or supervise the administration of significant social legislation. They represent a disintegrating tendency in state administration and their establishment has aggravated the problem of its reorganization.<sup>49</sup>

<sup>45</sup> Dodd, *op. cit.*, 328.

<sup>46</sup> In Wisconsin and Oregon the secretary of state acts as auditor and in New Hampshire a committee performs the duties of an auditor.

<sup>47</sup> See Kimball, *op. cit.*, 153.

<sup>48</sup> Dodd, *op. cit.*, 227.

<sup>49</sup> F. H. White, "The Growth and Future of State Boards and Commissions," 18 *Am. Pol. Sci. Rev.*, 631-657 (1924).

## VI. THE ENFORCEMENT OF EXECUTIVE RESPONSIBILITY

It is obvious from the above description of the highly disintegrated and decentralized character of the executive department of state government that its effective control is impossible. One is really dealing in irony, fiction, and pathos to discuss the ineffective means now generally employed in the various states to enforce executive responsibility. The states have quite uniformly constructed machinery of different kinds by which the executive officers of the government may be removed for failure to perform their constitutional or statutory functions, or for misconduct in public office.<sup>50</sup> First among these is, of course, the process of impeachment.

This power originally was vested in the legislature as a possible defense against executive encroachment and usurpation; its unwieldiness has prevented its effective use for this purpose. Inasmuch as governors were, and are, chosen by the people at large and for exceedingly short terms, there is little real need for the power of impeachment to maintain legislative supremacy. Again, if a legislature were not able to override by a two-thirds vote the veto of the governor there is little probability that it would be able to impeach a governor, and succeed on the charge, on the ground that he had refused to assent to laws which in the opinion of the legislature were essential to the public good. In nearly all the states impeachment proceedings may be instituted at any regular session of the legislature and special sessions called by the governor.<sup>51</sup> Impeachment has never been a success as a removal remedy and is now seldom attempted. It is too cumbersome and spasmodic to answer the purposes of a ready and constant means of enforcing executive responsibility in the every-day affairs of government.<sup>52</sup>

The process of impeachment in the states does not differ materially from that of the government of the United States. Charges are usually preferred in the lower house, and the upper house sits as a court to decide facts and law as presented in the indictment. In New York, however, the judges of the Court of Appeals are

<sup>50</sup> Oregon is the only state in the Union that does not provide for impeachment.

<sup>51</sup> M. T. Van Hecke, "Impeachment of Governor at Special Session," 3 *Wis. Law Rev.*, 155 (1925).

<sup>52</sup> C. S. Potts, "Impeachment as a Remedy," 12 *St. Louis Law Rev.*, 17-23 (1926).

added to the Senate in impeachment trials.<sup>53</sup> Impeachment is theoretically a judicial process, and is surrounded with all the elaborate mechanism for protecting the rights of the accused which are encountered in regular judicial procedure. The chief justice of the state usually presides over the senate at the trial of executive officials. The concurrence of two-thirds of the senate is necessary for conviction, which has the effect of removal from office but does not prevent criminal prosecution.

Actually impeachment is a political process and is not invoked as long as the machine can agree on the distribution of the spoils. There have been only twelve governors impeached in the entire history of our state governments and only six convictions and removals.<sup>54</sup> In most instances, while there were important issues involved, they merely constituted a pretext for the elimination of a strong and able governor who was refusing to play the game with the political bosses.<sup>55</sup> Woodrow Wilson more than forty years ago gave a classic description of the ineffectiveness of impeachment in his own inimitable style as follows: "The processes of impeachment, like those of amendment, are ponderous and difficult to handle. It requires something like passion to set them a going; and nothing short of the grossest offenses against the plain law of the land will suffice to give them speed and effectiveness. Indignation so great as to overthrow party interest may secure a conviction; nothing less can. Indeed, judging by our past experience, impeachment may be said to be little more than an empty menace."<sup>56</sup>

The recall has frequently been advocated as a possible substitute for removal by impeachment. "It is argued that, since the process of impeachment is so difficult to operate the power to deprive an executive of office before the expiration of his term by popular vote will accomplish the same result more directly. Usually,

<sup>53</sup> James Q. Dealey, *The Growth of American State Constitutions* (1915), 180.

<sup>54</sup> Five of these occurred at the South during Reconstruction days and during the same period two impeachments took place at the North. All of these instances represent an abnormal period in American politics. Of these seven governors, two were removed, one was acquitted, one resigned to escape conviction, and the charges were withdrawn against the other three. More recently, Sulzer of New York (1913), Ferguson of Texas (1917), Walton of Oklahoma (1923), and Johnson of Oklahoma (1929), were impeached and removed.

<sup>55</sup> See *American Year Book* (1913), 53; S. P. Orth, *The Boss and the Machine* (1919), 128, and Gustavus Myers, *The History of Tammany Hall* (1917), 368.

<sup>56</sup> *Congressional Government* (1884), 275-276.



however, the recall is advocated on the general ground that the voters should have the power to retire legislators and executives from office whenever they lose confidence in them. Executive officers can be impeached only for high crimes and misdemeanors, misfeasance or gross misconduct in office. Legislators cannot be impeached at all, and the legislatures are the sole judges of the elections and qualifications of their own members. Consequently, neither legislators nor executives can be removed from office on account of failure properly to represent the people in matters of policy or on account of general loss of popular confidence in their integrity or capacity."<sup>57</sup> Under a system of biennial elections, the brevity of tenure makes the establishment of continuous popular control comparatively unimportant; with the extension of the length of terms, however, the necessity of effective popular control acquires a greater significance. The centralization of executive power in the hands of the governor, a tendency which very slowly seems to be gaining some headway, further emphasizes the need for such control.

The machinery of the recall is not extremely complicated. Petitions are circulated requesting recall, usually with reasons for such stated, and qualified voters are requested to sign. After the required percentage presumably has requested a recall, the petition is submitted to the secretary of state or some other designated officer who checks the signers. Duplicates, persons who are not properly registered and eligible to suffrage, forged names, and fictitious personages are removed. If the list of qualified electors is still adequate, a special election is called. The official sought to be recalled may run either against his record or, in a number of instances, special elections allow other candidates to enter. If the governor is recalled, under the first plan, another election is immediately called to fill the office. If other candidates have entered, the candidate polling the highest vote assumes the gubernatorial office immediately.<sup>58</sup>

The recall, however, like impeachment, has had comparatively little part in the removal of state officials. Probably the outstanding instance occurred in 1921 when Lynn Frazier, governor of North Dakota, the attorney-general, and the commissioner of agriculture were recalled from office because of their connection with certain controversial points growing out of the Non-Partisan

<sup>57</sup> Holcombe, *op. cit.*, 335.

<sup>58</sup> Frank G. Bates and Oliver P. Field, *State Government* (1928), 125-126.

League movement.<sup>59</sup> The next year, however, Frazier was sent to the United States Senate from that state. In 1922 two members of the Oregon public utility commission were recalled because of their authorization of unpopular rate increases.<sup>60</sup> The recall as an agent of control is impractical and expensive. It lends itself to the purposes of cliques and its chief value is psychological. "In states where terms of office are long," says Holcombe, "the recall doubtless gives to the voters a feeling of greater security against possible misgovernment, and to legislators and executives a feeling of more immediate responsibility. Apparently, therefore, it must be regarded as an extraordinary remedy whose chief value lies in its potential rather than in its actual use, a 'gun behind the door,' as it aptly has been described."<sup>61</sup>

<sup>59</sup> D. H. Carroll, "The Recall in North Dakota," 11 *Nat'l. Mun. Rev.* 3 (1922).

<sup>60</sup> J. D. Barnett, "Fighting Rate Increases by the Recall," 11 *Natl. Mun. Rev.*, 212 (1922).

<sup>61</sup> *Op. cit.*, 336.

## CHAPTER XXXV

### STATE ADMINISTRATION

Unless the leadership that directs the affairs of government and of business can rise to higher levels, the prospects for co-ordinating political and economic organization are indeed meager.

—EARL WILLIS CRECRAFT.

#### I. THE MEANING OF ADMINISTRATION

"Whenever we see the government in action as opposed to deliberation or the rendering of a judicial decision, there we say is administration. Administration is thus to be found in all the manifestations of executive action."<sup>1</sup> But administration is something more than action. It includes the executive organization of the state. "Administration is the function of execution; the administration is the totality of the executive and administrative authorities."<sup>2</sup> In its final analysis administration consists in the execution, in the manner prescribed by the executive, of the policies of government which have been determined by the legislature, and, in some cases, the electorate.<sup>3</sup> Its ramifications are far-reaching. "In it," says Holcombe, "the historian finds reflected the material, intellectual, and moral changes of American life."<sup>4</sup> Our contemporary social and economic institutions in the United States are to a very considerable degree fostered, modified, or restrained by the innumerable administrative services of the several states. The political scientist, however, is chiefly concerned with the evaluation of these services and of the agencies through, and the procedure by, which they are performed.<sup>5</sup>

<sup>1</sup> Frank J. Goodnow, *Comparative Administrative Law* (Students Ed., 1893), 2.

<sup>2</sup> *Ibid.*, 5.

<sup>3</sup> For discussion of the nature of the law governing administrative officers and agencies, see Ernst Freund, *Cases on Administrative Law* (1911), 1 *et seq.*

<sup>4</sup> *State Government in the United States* (Rev. Ed., 1926), 337.

<sup>5</sup> See John Mabry Mathews, *Principles of American State Administration* (1917), 3-21; Woodrow Wilson, "The Study of Administration," 2 *Pol. Sci. Quar.*, 197-222 (1887).

## II. EDUCATION

Without question, the greatest single activity in which states engage at the present time is that of educational administration. In the colonial era and during the earlier decades of our national existence little thought was given by the central governments of the colonies or states to elementary public schools; in fact, outside of New England there were few local governmental areas which maintained common schools. Attendance nowhere was compulsory, nor was tuition free except to those who were unable to pay. Educational facilities were almost exclusively matters of private, or more often ecclesiastical, initiative and enterprise.<sup>6</sup>

The nineteenth century and the first quarter of the twentieth witnessed revolutionary developments in the United States in public education. Free common schools were established in all states and attendance upon them or private schools of equivalent character was made compulsory within certain age limits.<sup>7</sup> The development of a system of public education necessitated the establishment of secondary schools, evening and continuation schools, trade and industrial schools, teachers' colleges, universities, agricultural and mechanical colleges, professional schools except theological, special schools for the training of defectives and delinquents, state libraries, and traveling institutes for the furtherance of adult education. The state became a huge service institution in education. It therefore became necessary to develop an administrative agent peculiarly fitted to direct and supervise this service. This agent is generally known as the department of education, and is under the direction of the state superintendent of public instruction, in some states called commissioner of education, who is popularly elected in thirty-two states, appointed by the governor in eight, and elected by state boards of education in eight.<sup>8</sup> The functions and internal organization of this department vary from state to state, and in all but two states there is associated with the superintendent a board of education, composed of ex-officio, appointive, or elective officials.<sup>9</sup> Frequently the functions

<sup>6</sup> E. P. Cubberley, *Public School Administration* (1922), Chs. I, II, III.

<sup>7</sup> The United States Supreme Court in *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary* declared unconstitutional a state statute compelling children between six and sixteen years to attend only the public schools. See 268 U. S. 510 (1925).

<sup>8</sup> Walter F. Dodd, *State Government* (2nd Ed., 1928), 227.

<sup>9</sup> In some instances the state board of education is selected by a combination of these methods. See Holcombe, *op. cit.*, 340.



of the board are nominal and perfunctory, though in several states it exercises control over state school funds, elects a secretary or commissioner who serves as state superintendent, appoints county superintendents and school boards, selects textbooks, prescribes curricula, supervises the printing of texts when this work is done by the state, and purchases texts when such purchasing is centralized. Not infrequently the state board controls the teachers' colleges of the state, and in a few acts as a board of control for all state educational institutions. Often the state divides these functions among independent and more or less uncorrelated bodies, creating separate boards for the adoption of textbooks, the administration of educational fiscal affairs and lands, the management of special schools, and the examination and certification of teachers.<sup>10</sup>

In a few states, such as New York, the superintendent of education enjoys security of tenure, a reasonable degree of independence from political interference, an attractive salary, and comparatively broad powers of supervision and control. The majority of states, however, very highly circumscribe the powers of this office, although the tendency is in the direction of greater centralization of educational administration. In general, his powers are (a) supervisory—visiting schools, requiring reports of local school officials, and making regulations for the enforcement of the school laws; (b) advisory and judicial—advising local school boards in administrative matters and hearing appeals from their decisions; and (c) administrative—examining and certifying teachers, recommending textbooks, and distributing school funds. His legal powers are not an index to his influence on the school system if he is an able official and enjoys the leadership of the educational forces of the state. Nevertheless, it would appear that "there is no common rule for the division of power between the different central educational authorities, and, in general, no systematic arrangement for effective coöperation between them."<sup>11</sup>

State administration of education is highly decentralized and chaotic in many respects. Numerous state educational institutions of various grades and character have been established usually by political influences without the proper coördination and relation to the needs of the state. The result is too many schools, too much overlapping, high cost of administration, and consequently inade-

<sup>10</sup> Everett Kimball, *State and Municipal Government in the United States* (1922), 172-176.

<sup>11</sup> Holcombe, *op. cit.*, 340.

quate support. In other words, the states, generally speaking, have many schools but no educational system. The policy of establishing a state educational institution at every little town for financial reasons, so recklessly pursued in the past and not yet abandoned in many of the states, is probably the most serious problem facing state education at the present time.

As a check upon this tendency there should be a state board of education with the power to study the state's educational activities and institutions, to advise the legislature in educational matters, and to elect the state superintendent or commissioner of education. This board should be appointed by the governor and be advisory to all other educational boards having charge of state institutions.<sup>12</sup>

### III. CHARITIES AND CORRECTIONS

From an unsystematic and ineffectual administration of poor relief by the local governmental areas, charity administration has, in comparatively recent years, developed into an object of central supervision and control, and, in some instances, into a state function. There are two reasons for this: first, there developed a class of people without fixed residence, the maintenance of whom proved a heavy burden to the towns; and second, the granting of state aid has as its corollary state supervision, which at first was almost negligible, but in time became very minute and detailed, until in some instances the state was practically forced in self-defense to assume the function of maintaining institutions for the relief and care of the poor.

In 1851 Massachusetts established a board of alien commissioners having certain supervision over specified classes of indigents, and in 1863 created a state board of charities. Centralized administrative control through such boards rapidly spread throughout the United States until at the present time practically all states have central charity administrative machinery. These boards are generally of two types: (1) supervisory and (2) mandatory. The chief characteristic of the supervisory board is that "the actual management of the institution or charity is still vested in a local board of trustees. This insures the services of certain public-minded citizens, but not necessarily of expert persons. The legal powers of the supervisory board are slight, yet their influence, through publicity, is great."<sup>13</sup>

<sup>12</sup> J. M. Mathews, *American State Government* (1924), 398-403.

<sup>13</sup> Kimball, *op. cit.*, 179.

The success of this type of board has ended in its being given a veto power over local administration of charities and in most instances its conversion into an administrative board consisting of a salaried membership and exercising stronger powers. These boards of control appoint the superintendents of the state charitable institutions, fix the salaries of their employees, purchase their supplies, and generally supervise their administration.<sup>14</sup> A recent tendency in line with the administration of educational institutions is found in Iowa where the board selects the superintendents of the various charitable institutions but leaves their administration to these officials. This is undoubtedly a more efficient type of administration.<sup>15</sup>

The general tendency is for the state to exercise a much more rigid control over both public and private charity, particularly in the case, as is comparatively common, of governmental subsidization of private charitable organizations. "There is great danger in appropriating a lump sum to a charitable organization without guarantee that it will be economically or properly spent. If the policy of making state grants to private institutions is to continue, some method of control or supervision should be employed."<sup>16</sup> To this end Illinois requires inspection and approval by state officials as a necessary prerequisite to the incorporation of charitable institutions;<sup>17</sup> Oklahoma is even more stringent in providing that all charitable institutions, both public and private, whether receiving state aid or not, shall be subject to the inspection of state officials.<sup>18</sup>

Originally, the state correctional system consisted of jails and prisons maintained by counties and cities, supplemented by a state penitentiary. The failure of the local authorities to make adequate provision for the cleanliness and health of prisoners led ultimately to state supervision. Beginning with the establishment in 1846 of the inspectors of the state prison in New York, the system was gradually expanded to include all its penal institutions and in this form was generally adopted by the other states. As in the case of charities, penal institutions were at first super-

<sup>14</sup> See S. P. Breckenridge, *Public Welfare Administration in the United States* (1927), 606-615.

<sup>15</sup> C. E. McCombs, "State Welfare Administration and Consolidated Government," 13 *Nat'l. Mun. Rev.*, 46 (1924).

<sup>16</sup> Kimball, *op. cit.*, 178.

<sup>17</sup> Henry C. Wright, *Valuation of a System for the Administration of State Institutions Through One Man Control as Operated in Illinois* (1922).

<sup>18</sup> See J. L. Gillin, *Poverty and Dependency* (1921), Chs. XIV-XVI.

vised by advisory boards, which eventually came to exercise mandatory administrative powers.

One of the most important problems arising in connection with correctional administration is that of the classification of prisoners. Practically all states classify prisoners on the basis of age, sex, and criminal records. Many states, however, carry the classification much further, and establish institutions specifically designed to meet the requirements of each particular class. Reformatories are provided for the more immature offenders, state farms for those who possibly would be responsive to agricultural training coupled with comparatively lenient discipline, while the criminally vicious and the habitual offenders are more rigorously policed to prevent their further interference with the normal course of society.<sup>19</sup> A second problem occurring in this connection is that of prison labor. Compulsory labor has a twofold significance for correctional purposes. In many cases it accelerates reformation and readjustment and preserves discipline; it also relieves the state of a portion of the burden in connection with prison maintenance.<sup>20</sup> "The helpful results of labor for the prisoner are practically everywhere admitted, but very grave difficulties and divergencies lie in its application. In some states the lease system is employed, by which the labor of the convicts is let out to a contractor. This is highly objectionable and is subject to grave abuse. A better system is the employment of the convicts by the state on state enterprises."<sup>21</sup>

There is finally the question of pardon and parole. Criminal law ordinarily provides punishment for specific crimes, with maximum or minimum time sentences. This sentence is imposed by the judge presiding in the court of conviction, and is based only upon such knowledge of the prisoner as is revealed at the trial; in consequence, the advisability of the punishment is often a matter of indefiniteness and uncertainty. A number of states have utilized the device of indeterminate sentence, prescribing certain rather broad limits of imprisonment, and vesting in a board of presumably expert penologists the responsibility and power of determining the time of release. Prisoners frequently are released and required periodically to report to state officials. These methods involve, of course, the creation of boards of pardon and parole, in connec-

<sup>19</sup> F. H. Guild, "Administration and Supervision of State Charities and Corrections," 10 *Am. Pol. Sci. Rev.*, 327-335 (1916).

<sup>20</sup> See F. H. Wines, *Punishment and Reformation* (1919), *passim*.

<sup>21</sup> Kimball, *op. cit.*, 181.



tion with which many difficult and delicate problems arise. Probation and the suspended sentence involve, of course, the same principles except that the penalty in the former is not actually imposed and in the latter is suspended, each ending in the offender being placed on probation. The probationer is simply required to report to a probation official and to be under his control. The purpose of the suspended sentence "is to save the first offender from the shame and disgrace of serving a term in the penitentiary and to give him a chance to reform and lead a decent life. It is based on the well-known fact that nothing so completely breaks down a man's self respect and confirms him in the criminal life as serving a term in prison under the conditions and with the evil associations that exist in most state penitentiaries."<sup>22</sup> "These newer methods of dealing with criminals are designed to decrease crime by effecting a reformation before the criminal habit is formed. To insure success they must be carefully and intelligently administered and subject to most painstaking supervision."<sup>23</sup>

#### IV. PUBLIC HEALTH

Public health administration began in the early days of the Republic. Originally about the only attempts made in this direction were those in connection with the establishment of quarantines in the port cities under the supervision of port officials. Such efforts proved unsatisfactory, and the larger cities found it necessary to establish local boards of health. "For the purpose of preventing the spread of disease, and abating nuisances of various kinds prejudicial to the public health, very extensive though unequal powers have been conferred upon administrative officials in all the states."<sup>24</sup> Their powers briefly considered are as follows: (1) the power to investigate the cause, prevalence, and location of disease; (2) compulsory isolation of the sick at home or in hospitals; (3) free medical treatment and nursing in some cases; (4) public preventive medicine, such as the preparation of vaccines, antitoxins, etc.; (5) medical examination of immigrants and school children; (6) care of corpses, if necessary, in transportation and burial; (7) free diagnosis in public clinics; (8) disposal of sewage, garbage, smoke, etc.; (9) suppression of ob-

<sup>22</sup> Charles S. Potts, *Criminal Law* (1929), 24. (A reprint of articles on Texas Criminal Law appearing in the *Dallas Morning News*, Dec. 26, 1928-Jan. 9, 1929.)

<sup>23</sup> Kimball, *op. cit.*, 181-182.

<sup>24</sup> Holcombe, *op. cit.*, 346.

noxious trades and of offenses against the public morals; (10) regulation of industrial conditions, hours of labor, and, in some instances, wages; (11) regulation of housing conditions through building laws and inspection; (12) control of the manufacture and sale of explosives; (13) control of the sale of impure foods, poisonous drugs, etc.; (14) public instruction in personal and social hygiene; (15) regulation of the practice of all professions connected with the public health.<sup>25</sup>

These functions sometimes are exercised by a centralized board of health;<sup>26</sup> more often they are placed under the jurisdiction of separate boards and commissions. These boards vary greatly in size, jurisdiction, and qualifications. The tendency at the present time is toward a relatively small board with extensive powers, composed of technically trained experts. The New York law of 1913 establishing such a board requires a six-member council consisting of physicians and experts in sanitation. Massachusetts has a similar board. In some instances these boards appoint one or more members of local health boards and may also remove them. In Pennsylvania ten district health officers are appointed by the state commissioner of health with considerable control over local health authorities. State inspectors are used in New York, Illinois, and Massachusetts.<sup>27</sup> "Health administration," says Dodd, "is regarded as chiefly a matter of state, rather than of local interest."<sup>28</sup>

## V. LABOR LAW ADMINISTRATION

"The most important division of public health administration, not commonly placed under the jurisdiction of state health departments or boards, is the enforcement of health and safety legislation designed for the special protection of wage earners."<sup>29</sup> In the earlier days of labor legislation its administration was entrusted to various boards and bureaus, such as the Massachusetts Bureau of Labor Statistics established in 1869.<sup>30</sup> Like the health

<sup>25</sup> For a brief analysis of the development of state health agencies, see Robert D. Leigh, *Federal Health Administration in the United States* (1927).

<sup>26</sup> John A. Fairlie, *Local Government in Counties, Towns and Villages* (1906), 239.

<sup>27</sup> See S. B. Grubbs, "Public Health Administration in Illinois," *Reports of the U. S. Public Health Service* (May 21, 1915).

<sup>28</sup> *State Government* (2nd Ed., 1928), 427.

<sup>29</sup> On labor legislation and administration see J. R. Commons and J. B. Andrews, *Principles of Labor Legislation* (Rev. Ed., 1920), *passim*.

<sup>30</sup> Holcombe, *op. cit.*, 349.

and charities boards, these central bodies were at first merely advisory. Subsequently, mandatory power was extended to the inspection of factories, and to the regulation of the working conditions of industry. At the present time all of the states, under various laws, have made provision in one way or another for the inspection of fire hazards, boilers, mines, dangerous machinery and processes of manufacture, lighting, heating, sanitation, and for the regulation of the hours of labor and other conditions of employment.<sup>31</sup> Because of the importance of satisfactory labor conditions to society and the exceptional difficulties involved in the enforcement of labor legislation, it was necessary to devise a different type of administrative machinery from that employed in the administration of health legislation.

It has long been an accepted doctrine that the state, under its police power, could regulate the conditions and circumstances of industrial employment, within, of course, certain limitations.<sup>32</sup> But in recent years the complicated character which the industrial order has assumed has necessitated a considerable extension of its authority in this field. For example, more than a dozen states, beginning with Massachusetts in 1912, have enacted minimum wage laws applicable to men,<sup>33</sup> women, and children. While the United States Supreme Court has in several instances invalidated such legislation,<sup>34</sup> time and circumstance eventually will doubtless make such regulation recognized as necessary and legitimate.<sup>35</sup>

Beginning with Maryland in 1878, many of the states have established administrative agencies of various sorts for the peaceful settlement of industrial disputes through mediation, conciliation, and voluntary arbitration. The value of such agencies has been considerably impaired by a judiciary wedded to the doctrine of *laissez-faire*, private interest, and the rule of reason classically set in outworn precedent. The state of Colorado in 1915 passed a law providing for compulsory arbitration of labor disputes by the state industrial commission and forbade strikes, lockouts, or

<sup>31</sup> For a digest of state labor laws see *Labor Laws of the United States with Decisions of Courts Relating Thereto*, a publication of the United States Bureau of Labor Statistics, Bulletin, 370 (1925).

<sup>32</sup> See Freund, *op. cit.*, 43 *et seq.*

<sup>33</sup> The Kansas act of 1920 applied to men.

<sup>34</sup> *Adkins v. Childrens Hospital of the Dist. of Col.*, 261 U. S. 525 (1923).

<sup>35</sup> "To oppose legislative discretion by undefined judicial standards of reasonableness is to oppose legislative by judicial discretion, and constitutional doctrines so vaguely formulated cannot be expected to command confidence." E. Freund, *Standards of American Legislation* (1917), 5; see also, B. N. Cardozo, *The Nature of the Judicial Process* (1921), 76 *et seq.*

any changes in the terms of employment until a hearing and report by the commission. Its decisions, however, were not made conclusive upon the disputants and, therefore, were not subject to judicial review. In 1920, Kansas enacted a law applicable to public utilities and to all industries concerned with the production and distribution of food, clothing, and fuel, prohibiting strikes and lockouts and compelling arbitration before a state court of industrial relations. The awards of this tribunal were made mandatory and might cover conditions of labor, hours, minimum or standard wages, and certain other phases of the business affected. If production and operation were suspended as a result of an inquiry, the court was further empowered to assume control and operate the industries concerned. In 1923 the most important provisions of this act were declared unconstitutional by the Supreme Court of the United States,<sup>36</sup> and in 1925 the court of industrial relations was abolished by the legislature.

Legislation of a more purely social character primarily designed for the protection of laborers and their dependents and usually taking the form of workmen's compensation acts and mothers' pensions has been enacted by most of the states. Maryland adopted the first workmen's compensation act in 1902; since that time forty-one other states have enacted statutes with approximately the same purpose in view.<sup>37</sup> As a result of the Industrial Rehabilitation Act of 1920, whereby Congress granted conditional subsidies to states to be used in restoring to civil employment persons injured in industry or any legitimate occupation many states have accepted federal subventions, and provided for such rehabilitatory services.<sup>38</sup> Mothers' and old age pension laws are found in forty-two states, and although largely administered by the local authorities are, in about half of the states, subject to varying degrees of central supervision and control.<sup>39</sup> The states have not as yet attempted to meet the unemployment situation by

<sup>36</sup> *Wolff Packing Co. v. Court of Industrial Relations*, 262 U. S. 525 (1923).—unconstitutional as to fixing wages in meat packing establishments; *ibid.*, 267 U. S. 552 (1925).—unconstitutional as to mandatory arbitration in a business regulated by competition and not affected with a public interest.

<sup>37</sup> Workmen's compensation also has been a cause of considerable litigation and objection, chiefly on the ground of due process and its abrogation of the time-honored fellow-servant rule of the common law. It was validated, however, in *Second Employers' Liability Cases*, 223 U. S. 1 (1912), and has not seriously been questioned since.

<sup>38</sup> Holcombe, *op. cit.*, 352.

<sup>39</sup> For example, the Nevada law of 1925 provides for administration exclusively by the counties. The Wisconsin law of the same year makes old



establishing a system of unemployment insurance; they have, however, come rather stringently to regulate activities of private employment agencies, to provide, in some instances, public employment agencies, and at times have attempted to alleviate conditions by the construction of public works.<sup>40</sup>

As a result of the extension of state activities in the field of labor legislation many special enforcement agencies have been created. This policy has ended in a multiplicity of such agencies acting substantially independently both of each other and of the rest of state administration. Recently, however, beginning with Wisconsin in 1911, a tendency to centralize labor administration was inaugurated and now approximately one-fourth of the states have consolidated departments of labor, headed by an industrial commission<sup>41</sup> or a single director.<sup>42</sup>

## VI. AGRICULTURE

In many states the problems of agriculture are as important and diverse as those of industry, and in recent years considerable legislation creating special agencies for agricultural administration has been enacted. As in the case of labor administration, little effort has been made to provide an inclusive, integrated, and correlated program of agricultural administration.<sup>43</sup> Among the more important of these boards are those relating to agriculture, stock raising, plant culture, forestry, dairying, and inspection of hides and fertilizers.

The first boards of agriculture established had only advisory powers pertaining to such matters as the stimulation of rural industry and the patronage of agricultural fairs; later they came to exercise such powers as the distribution of state funds to fair organizations if certain conditions were met; and finally in a few states they have been granted complete control of state fairs and other important agricultural matters.

The functions of these bodies at the present time fall into five general categories. First may be indicated their duties of a statistical, educational, and scientific character, comprehending the college pensions optional, to be administered by the county judge subject to the state board of control.

<sup>40</sup> For instance, a California law of 1921 allows the extension of state construction projects during periods of extraordinary unemployment caused by temporary depression.

<sup>41</sup> Wisconsin, Minnesota, and California.

<sup>42</sup> Illinois, New Jersey, and Tennessee.

<sup>43</sup> Probably the standard treatise on this subject in the United States is E. Wiest, *Agricultural Organization in the United States* (1923), Ch. XIV.

lection of rural statistics, the planning, the conducting, or the supervising of county fairs and institutes, the analysis of soils and fertilizers, the registration of live stock, and the study and suppression of animal and plant diseases. In the second place they perform a supervisory function through the inspection of dairies, dairy products, herds, and meat products, and the grading of cotton, fruits, and other crops.<sup>44</sup> Thirdly, as conservation agents they assist in the preservation and propagation of fish and game, the conservation of natural resources, especially forests, the drainage of swamps, and the establishment and formulation of irrigation projects. Fourthly, they supervise public warehouses and markets, regulate cold storage, examine and license veterinarians.<sup>45</sup> Finally, they coöperate with farmers' organizations and marketing associations in the distribution and sale of their products. In the last capacity they are performing a relatively new and valuable service. We are just beginning to realize the possibilities of collective bargaining and selling for the farmers.<sup>46</sup>

## VII. PUBLIC WORKS

In the early days of the Republic the chief expenditures of the states for public works were for the construction and maintenance of armories for the use of the state militia and the building of a few turnpikes without any purpose or highway system in mind. From this unpretentious and unsystematic beginning, public works have come to constitute next to education the biggest business of the states. The major divisions of the states' activities in this field are the construction and maintenance of highways, the building and, in some instances, the operation, of water works of various kinds,<sup>47</sup> including storage reservoirs for irrigation purposes or urban supply, river and harbor improvements, drainage, and flood prevention,<sup>48</sup> state parks and reservations,<sup>49</sup> and public buildings

<sup>44</sup> Frank G. Bates and Oliver P. Field, *State Government* (1928), 354-356.

<sup>45</sup> Kimball, *op. cit.*, 189.

<sup>46</sup> Holcombe, *op. cit.*, 354; see Harry Barth, "Six Years of Cooperation in Oklahoma," 9 *Southwestern Pol. and Soc. Sci. Quar.*, 76 (1928).

<sup>47</sup> New York is, of course, the outstanding example. Georgia and Texas are the only states which own a railroad at the present and these roads are leased to private companies. See in this connection C. D. Thompson, *Public Ownership* (1925), 77-78.

<sup>48</sup> The problems of water supply and drainage are being increasingly dealt with by interstate agreements. For example, the Colorado and Delaware River Compacts involve over ten states. See Holcombe, *op. cit.*, 355, note 2.

<sup>49</sup> Sixteen states have established state forest reserves, and twenty-six have established state parks. See H. A. Caparn, "State Parks," 10 *Nat'l. Mun. Rev.*, 581 (Supplement, 1921).

and monuments. Of these, the transportation problem is by far the most important in the great majority of the states, though the electrification of industry through water power is coming to be a major consideration and undoubtedly has tremendous potentialities. All of these activities are under the supervision of state authorities, but as yet little headway has been made toward the establishment of compactly organized departments of public works; even where such departments have been created their designation is a misnomer, for only one or two of the major public works projects are included.

The highway problem was at first left exclusively to local initiative and jurisdiction. Later the state governments began to offer subventions to the localities to assist and promote the construction of certain arterial or trunk highways, the state supervising their construction.<sup>50</sup> New Jersey adopted this method in 1891; by 1898 Massachusetts, California, Connecticut, and New York had adopted a similar scheme, and now it is a general policy of the states.<sup>51</sup> Moreover, from merely aiding and supervising highway construction, they have advanced to the position of actively formulating and building a highway system: New York in 1906 authorized, by popular referendum, the issuance of \$50,000,000 in bonds to be used for this purpose. More recently many other states have borrowed heavily to execute comprehensive state highway plans.<sup>52</sup> This movement was given added impetus, of course, by the Federal Highway Act of 1916 and subsequent legislation, permitting the Federal Government to make large conditional subventions for the construction of state roads. "Every state in the Union accepted its provisions, and, in the year following its passage, more constructive highway legislation was placed upon the state statute books than had ever before been enacted in a similar period in the history of the country. Prior to 1916 the Federal government took no active part in road building; to-day about one-half of all highways in course of construction are receiving federal aid, and all are subject to the inspection and approval of federal engineers." <sup>53</sup>

<sup>50</sup> A standard work in this connection is G. R. Chatburn, *Highways and Highway Transportation* (1923); for the evolution of the road policy of a particular state see W. C. Plummer, *The Road Policy of Pennsylvania* (1925).

<sup>51</sup> Fairlie, *op. cit.*, 264-269.

<sup>52</sup> Holcombe, *op. cit.*, 357.

<sup>53</sup> A. F. MacDonald, *Federal Subsidies to the States* (1923), 69, and *Federal Aid* (1928), 85-122.

As a result of this action state highway construction assumed such vast proportions as to require the establishment of state administrative agencies for its control. State highway departments, bureaus, boards, or commissions are now found in all the states. Their functions may historically be indicated as follows: first, the inspection of local roads, and the advising of local authorities; second, the allocation of state subsidies among its subdivisions; third, the actual construction of roads. This last function is the one of primary importance at the present time, and is generally performed by the letting of contracts for road construction to private construction companies. In some instances these agencies license drivers and supervise the use of the roads by the public. In general, they are independent of the chief executive, and responsible only to the legislature—an arrangement quite contrary to the principles of sound administration.<sup>54</sup>

### VIII. SUPERVISION OF CORPORATIONS

With the development of corporate enterprise and the protection accorded private interests by judicial decisions following the precedent set in the Dartmouth College Case,<sup>55</sup> there arose a demand for state supervision of such corporations as seemed to be vested with a public or semi-public function. This was particularly true with such enterprises as banking, insurance, and transportation. "After the Civil War, the increasing dependence of the public upon railroads, and, in the cities, upon urban public utilities, created a demand for special regulations to secure adequate services at reasonable rates without discrimination. The right of the state legislatures to regulate such corporations was affirmed by the Supreme Court of the United States in the Granger Cases,<sup>56</sup> and has been exercised in one form or another by practically all the states."<sup>57</sup> Among the earlier of such regulatory agencies created were, of course, the state railroad commissions usually exercising the powers of supervision and regulation of rates on purely intra-state commerce. In some instances the legislature has regulated rates.

<sup>54</sup> See Holcombe, *op. cit.*, 358.

<sup>55</sup> *Dartmouth College v. Woodward*, 4 Wheaton 518 (1819). The court held in this instance that a charter issued to a corporation was a contract, "the obligation of which cannot be impaired without violating the Constitution of the United States."

<sup>56</sup> See *Munn v. Illinois*, 94 U. S. 113 (1876).

<sup>57</sup> Holcombe, *op. cit.*, 358; also Kimball, *op. cit.*, 191 *et seq.*



A more recent development in corporate regulation has been the enactment by about forty states of "blue sky" laws.<sup>58</sup> These laws require that corporate securities be submitted to a special state official for inspection and that a license for their sale be secured from the state before they may be offered to the public.<sup>59</sup>

Commissioners of banking and insurance were established and at first were given only advisory powers such as the receiving of reports and making such of their contents public as seemed desirable. Subsequently these powers were extended to include the examination of the books and records of banking and insurance companies, the auditing of their accounts, the enforcement of requirements as to maintenance of reserves, the investment of their funds, and the excluding of undesirable enterprises from the further conduct of operations within the state.<sup>60</sup> In some instances the states have entered the banking and insurance businesses.<sup>61</sup> North Dakota has established a state-owned bank;<sup>62</sup> Wisconsin permits state authorities to engage in the life insurance business, and five states have provided systems of state hail insurance.

Probably the most important recent tendency in the regulation of corporate enterprise has been the growth of state supervision of public utilities, somewhat aside from the regulation of intra-state commerce. "Practically all states have one or more commissions for the regulation of public utilities, such as gas, electricity, and street railways. These commissions may, like the Massachusetts Gas and Electric Lighting Commission of 1885, regulate the issuance of securities or prohibit the construction of unnecessary works, and have advisory powers concerning the rates charged for service. The Wisconsin law goes even further and allows the commission to make a physical valuation of the plants under its supervision. Some power is given these commissions to fix the rate which may be charged."<sup>63</sup> The fact that rate regulation and supervision is impracticable, because of excessive expense, from

<sup>58</sup> The Kansas Act of 1911 was the first. Dodd, *op. cit.*, 10-11.

<sup>59</sup> J. M. Mathews, *American State Government* (1924), 343-350. It should be noted, however, that no states have yet been able effectively to regulate the issuance of securities except in the case of public service corporations.

<sup>60</sup> Holcombe, *op. cit.*, 359.

<sup>61</sup> The experience of such states has not been altogether encouraging. See Thornton Cooke, "The Collapse of Bank-Deposit Guaranty in Oklahoma and Its Position in Other States," 38 *Quar. Jour. of Eco.*, 108-139 (1923-24).

<sup>62</sup> See A. S. Tostelbe, "The Bank of North Dakota; an Experiment in Agrarian Banking," 104 *Columbia Univ. Studies* (1924) *passim*.

<sup>63</sup> Kimball, *op. cit.*, 192.

the viewpoint of the municipality, and disorganizing, because of conflicting regulation in the event several municipalities are served, from the utility's point of view, has served to vest regulation increasingly in central commissions. Motor buses are, of course, being subjected to similar control. It should be noted that municipally owned utilities are as thoroughly regulated by the state as privately owned services.<sup>64</sup>

### IX. STATE POLICE

Possibly the weakest point in the state's armor has been its dependence on a chaotic and obsolete police force for the enforcement of its laws. The state militia are unwieldy and unadaptable to the every-day character of law enforcement and the local police agencies are independent of state control. The result has been the enforcement of the law in spots and its nullification elsewhere. The efforts of the states to cope with this situation have proceeded along four general lines. In the first place, the enforcement of certain types of laws, such as those dealing with health, education, and labor, has been entrusted to specially constituted state agencies or to local officers subject to continuous state supervision. Secondly, in a number of states the governor has been given authority to remove local officials charged with the general administration of state law. Thirdly, the policy of state control over the police departments of the larger municipalities has gained some recognition.<sup>65</sup> Finally, state police forces have been established and vested with state-wide jurisdiction over enforcement.<sup>66</sup>

While the active movement for the establishment of state-wide police systems is comparatively recent, the idea dates from the organization of the Texas Rangers in 1835. Massachusetts established a state police force in 1865 and Pennsylvania in 1905. The recent drafting of the regular militia for war purposes, the after-war crime wave, the increased mobility and efficiency of the criminal by virtue of the automobile and other scientific inventions, the necessity of meeting industrial disorder without resort to the militia, traffic regulation, and prohibition enforcement have fur-

<sup>64</sup> Holcombe, *op. cit.*, 360.

<sup>65</sup> Boston, Baltimore, Kansas City, and St. Louis are the only important cities having state administered police systems at the present time. See W. B. Munro, *Municipal Government and Administration* (1923), II, 189 *et seq.*

<sup>66</sup> The standard work on state police is Bruce Smith, *The State Police* (1925); see also Milton Conover, "State Police Developments, 1921-1924," 18 *Am. Pol. Sci. Rev.*, 773 (1924).

ther exposed the incapacity of a local police force and caused a more rapid establishment of a highly organized and centralized state patrol.

The state police force is generally vested with the powers of local police officials without jurisdictional limitation except in some municipalities over strikes and riots.<sup>67</sup> Two types of organization have been adopted. In such states as Pennsylvania, New York, and New Jersey, the force is headed by a superintendent appointed by the governor and senate and subject to removal by the governor, while other states have placed their control under administrative boards. This method has been followed by Connecticut, Michigan, and West Virginia, and is undoubtedly a weaker and less efficient arrangement.<sup>68</sup> It amounts to the establishment of a plural executive with divided responsibility, indecision, and a lack of vigor in what should be the strong arm of the state. The governor is responsible for law enforcement in final analysis and should have the means for executing this responsibility. It is true, however, that state police systems have generally proved to be an efficient adjunct to the state executive and apparently are the answers to the perplexing problem of law enforcement in the states.<sup>69</sup>

## X. STATE PERSONNEL ADMINISTRATION

The functional expansion of state governments, and the centralizing tendencies which have characterized administrative reforms in recent years have created an incessant demand for technical proficiency in state governmental affairs—for expert administration.<sup>70</sup> The treatment of administrative positions as party “spoils” has until comparatively recently precluded the introduction of the merit system into state administration; experts will not accept public employment the tenure of which is contingent upon the continued success of a particular party or faction.<sup>71</sup> Following

<sup>67</sup> State police have in several instances been vested also with entirely extraneous functions, such as elevator and building inspection, censorship of Sunday amusements, and the issuing of automobile licenses. This is to be condemned, however.

<sup>68</sup> Holcombe, *op. cit.*, 366.

<sup>69</sup> State police have at times been a political issue, and have been abolished in Arizona, Colorado, Idaho, and New Mexico.

<sup>70</sup> A standard work on this subject is A. W. Procter, *Principles of Public Personnel Administration* (1921), *passim*.

<sup>71</sup> See T. Roosevelt, *Theodore Roosevelt; an Autobiography* (1913), 146-147, for an illuminating discussion on this point.

the example of the government of the United States, ten states, beginning with New York in 1883, have (1926) adopted the merit system,<sup>72</sup> though many of the states have established improved systems of personnel administration without definitely committing themselves to the merit principle.<sup>73</sup>

The more recent civil service laws of the states deal with four main phases of the personnel problem: (1) selection, (2) promotion, (3) removal, and (4) retirement. As a means to selection, positions in the public service are grouped into (a) the classified and (b) the unclassified. The unclassified include those filled by popular selection and the more important appointive places. These positions are, of course, not subject to the merit principle and are generally somewhat more remunerative than those in the classified service.<sup>74</sup>

The classified positions are generally divided into exempt, competitive, non-competitive, and unskilled labor. The exempt group, more properly belonging to the unclassified service, includes those confidential subordinates of heads of departments and bureau chiefs for whose selection it is claimed that a formal test is unsatisfactory. The competitive list includes the great majority of the employees whose appointments are made from a list of eligibles prepared by the civil service commission on the basis of an examination. Both oral and written examinations are used, also supplementary information as to previous experience, and in some instances personal conferences. The non-competitive positions are relatively few and call for special investigators, statisticians, or technicians who are examined by special tests. Unskilled laborers are usually recommended by the commission on the basis of age, residence, character, and industry. Appointments are made or vacancies are filled by the appointing officer from a list (usually the three highest) furnished by the commission from those who are qualified for the particular service desired.<sup>75</sup>

Promotion theoretically is based upon merit demonstrated by an examination and previous success, but actually political and personal influences are frequently the controlling factors. Removals are generally preceded by notice and a hearing. In some

<sup>72</sup> See M. Conover, "Merit Systems of Civil Service in the States," 19 *Am. Pol. Sci. Rev.*, 544-560 (1925).

<sup>73</sup> Holcombe, *op. cit.*, 387, note 3.

<sup>74</sup> W. C. Beyer, "Employment Standardization in the Public Service," 9 *Nat'l. Mun. Rev.*, 389-403 (1920).

<sup>75</sup> Lewis Meriam, "The Uses of Personnel Classification in the Public Service," 113 *Annals*, 215 (1924).



instances the removal charges must be filed with the commission and in Illinois the commission may hear an appeal from the removal order and reinstate, if it sees fit, the employee. In Massachusetts an appeal may be taken to the courts.

A retirement system is an essential part of an adequate personnel program. It is necessary as an elimination process, otherwise the service in the course of time becomes loaded with incompetent material. Furthermore, it is only simple justice to make some provision for those who have given their best efforts to the public service at a financial sacrifice. Retirement funds are usually provided by contributions from the employees based on a percentage of the salaries received and from funds contributed by the state. State-wide retirement systems are now provided by nine states and in three states they apply to all administrative positions.<sup>76</sup>

Various types of administrative machinery have been established to administer the civil service laws. Originally control was vested in a civil service commission consisting usually of three gubernatorial appointees with overlapping terms and representing the two major parties. The bipartisan character of the commission was expected to eliminate partisan influences and contribute to the performance of its quasi-legislative and quasi-judicial functions in promulgating rules for the service and hearing appeals from the decisions of administrative heads in removal matters. The bipartisan commission has not fully met the expectations of its proponents. In Maryland and Massachusetts personnel administration is under the control of a single commissioner. A more recent experiment which seems to embody sound principles of administration has placed the personnel problem under the jurisdiction of a central department of administration.<sup>77</sup>

The majority of the state commissions or directors are concerned only with problems of recruiting and control of employees in the state service; five states, however, vest in the central agency considerable powers of supervision and control of the personnel problem of the local governmental areas. This control may take the form of the actual administration of personnel, as in Massa-

<sup>76</sup> Paul Studensky, "Pensions in Public Employment," 11 *Nat'l. Mun. Rev.* 95-124 (1922).

<sup>77</sup> The Minnesota plan of reorganization combines the related functions of budget planning and execution, centralized purchasing, and personnel administration in a single central department of administration and finance. See J. S. Young, "Reorganization of the Administrative Branch of the Minnesota Government," 20 *Am. Pol. Sci. Rev.*, 75 (1926).

chusetts, or of central supervision of the local civil service commissions, as in New York and Ohio.<sup>78</sup>

## XI. TYPES OF DEPARTMENTAL ORGANIZATION

There are, at the present time, three types of departmental organization in which the department head is elected by the people: first, a single headed department; second, a multi-headed department, the members being elected in the state at large by all the voters; third, a multi-headed department, the members being elected by districts. The first type is, of course, the most common, and probably is best exemplified by the attorney-general's department. The second type illustrates the usual organization of the regents of the state universities in certain states; the third, by several railroad commissions and state boards of equalization. Because of the tendency of members to act primarily in a constituent or representative capacity, the third type of organization has been generally unsatisfactory. All three of these types may, of course, be criticized as decentralizing executive authority and responsibility, and as unnecessarily adding to the length of the ballot. Fortunately the tendency is away from the elective departmental head.


The gradual discarding of the elective principle has not, however, led to a general agreement as to the form by which it shall be superseded. There seem to be five major types of appointive administrative heads encountered in the administrative organizations of the several states: first, the department with a single head appointed by the governor, usually with the consent of the senate; second, the appointive head, being designated by a separate board or commission, usually unpaid, and exercising only advisory powers in addition to the power of appointment; third, the department with a multiple head, consisting of a board or commission, usually unpaid, which exercises its powers mainly through the instrument of a paid expert secretary; fourth, the department with a multiple head, consisting of a board or commission, usually paid, and operating directly through its own members; fifth, the department with a single head, appointed by the governor, with or without the consent of the senate, but depending upon the advice of an advisory council for the exercise of certain of his powers.<sup>79</sup> The last form of organization is in line with the lessons of experience and the advice of administrative science. It combines the

<sup>78</sup> Holcombe, *op. cit.*, 391.

<sup>79</sup> *Ibid.*, 395.

initiative of the expert with the check of the layman. "Under this form of government," says Holcombe, "a single commissioner, appointed by the governor, is charged with the enforcement of all the laws which fall within the jurisdiction of the department, and also with the enforcement of the codes elaborated by the advisory board or council. These councils are composed of representatives of the various interests most directly concerned in the work of the departments, appointed by the governor, together with the commissioner. They exercise no purely administrative powers but are limited to the quasi-legislative functions of making rules and regulations. . . . This form of organization gives logical application of the maxim, 'Many heads for council, one for action.' " <sup>80</sup>

<sup>80</sup> Holcombe, *op. cit.*, 399-400.



## CHAPTER XXXVI

### STATE FINANCE AND BUDGET

Stable finance rests not so much on pious hopes as on making both ends meet.

—A. E. BUCK.

#### I. THE INCREASE IN STATE EXPENDITURES

The expansion of state activities has brought, as its necessary corollary, a corresponding increase in governmental expenditures.<sup>1</sup> The problem of the formation of a comprehensive plan of state finance, consistent with the systems of the national, local, and municipal governments, and at the same time satisfying the standards of an adequate and equitable fiscal policy, is without question one of the most perplexing problems confronting students in the field of state administration. At the same time reformative action is frequently inhibited by constitutional limitations imposed at a time when the economic order was far less complex of operation and simpler of comprehension than at present.<sup>2</sup> This problem assumes a more aggravated form when it is recognized that the functional expansion of states, even as that of the nation and of municipalities, has resulted very largely from the assumption of social services; such services once inaugurated tend to become a necessary part of the standards of our civilization and apparently cannot be eliminated or restricted without doing violence to our social order.<sup>3</sup> The tendency is for government to become a huge service agency. The limits of this tendency are primarily financial rather than constitutional.

<sup>1</sup> C. Heer, "Rising Costs of State Government; Popular Theories versus Fiscal Facts," 15 *Nat'l. Mun. Rev.*, 277 (1926); also report of the New York Special Joint Committee on Taxation and Retrenchment on *State Expenditures, Tax Burden, and Wealth* (1926), 20, 27.

<sup>2</sup> H. Secrist, "An Economic Analysis of the Constitutional Restrictions upon Public Indebtedness in the United States," Bulletin, No. 1, Part 1, 8 *Univ. of Wis. Eco. and Pol. Sci. Series* (1914).

<sup>3</sup> C. Heer, "State Expenditures—Has Their Upward Climb Been Justified?" 16 *Nat'l. Mun. Rev.*, 322 (1927).



## II. THE NATURE OF STATE REVENUE

State revenues may be divided into five rather general classes: first, commercial revenues; second, administrative and miscellaneous revenues; third, public loans; fourth, bookkeeping revenues or transfers; fifth, taxation. The commercial revenues roughly may be defined as those funds accruing to the state from activities not strictly governmental, such as the operation of canals, railroads, banks, grain elevators, and the income from public money at interest,<sup>5</sup> as well as the income from the rental of portions of the public domain.<sup>6</sup> The second class includes departmental earnings such as fees from courts, charges for the filing of documents, highway privilege charges, fines, forfeitures and escheats, and federal subventions.<sup>7</sup> There is some question as to whether the third class legitimately may be classified as revenue, especially since funds so obtained eventually must be repaid. "In this respect, if the long-run viewpoint be taken, the public debt may be regarded as being no more a source of public revenue than the exercise of eminent domain, for which there is always a *quid pro quo*."<sup>8</sup> The fact remains, however, that funds are realized from such sources, and must be classified somewhere. The fourth class of revenues, bookkeeping transfers, hardly need comment; they constitute only nominal revenue, such as balances carried over and transfers. By all odds the most important source of state revenue is taxation, which merits somewhat extended discussion.

## III. TAXATION

State taxation is an exceedingly complicated subject because of the diversity of forms of property, the difficulties involved in its appraisal and assessment, and the complications arising in tax administration.

1. *The General Property Tax.* In point of historical precedence, prevalence, and the degree upon which it is relied for state income,

<sup>4</sup> H. L. Lutz, *Public Finance* (1924), 137.

<sup>5</sup> F. P. Gruenberg, "Interest in Public Deposits," 113 *Annals of Am. Acad. of Pol. and Soc. Sci.*, 147 (1924).

<sup>6</sup> Statistics as to the productivity of such sources will be found in the Bureau of Census' *Financial Statistics of States* (1926), 18, 22, 23, 26, 28.

<sup>7</sup> See E. C. Potter, "The Earnings of Public Welfare Institutions," 113 *Annals of Am. Acad. of Pol. and Soc. Sci.*, 135 (1924); also, A. F. McDonald, "The American Subsidy System," 14 *Nat'l. Mun. Rev.*, 692 (1925).

<sup>8</sup> Lutz, *op. cit.*, 139.

the general property tax is the chief source of state revenue at the present time.<sup>9</sup> The general nature of this tax may be indicated as follows:<sup>10</sup>

a. *Property Subject to Taxation.* All property is taxable at a uniform rate unless specifically exempted. Two general classes of property, real and personal, are recognized; the first includes lands and permanent improvements attached thereto; the second, all movables, tangible or intangible.<sup>11</sup>

b. *Basis and Method of the Tax Levy.* The basis of such a tax is on the valuation of the property taxed expressed in terms of money. Legal standards vary widely, and only rarely is property assessed at full value. The property of each individual is listed in considerable detail upon assessment forms by the assessor. The totals are then assembled and, after review, become the tax roll. Taxes are levied either as a rate for certain purposes, or as an apportionment to the locality of a certain amount.

c. *Place and Date of Assessment.* Real property usually is assessed in the district in which it is located, without regard to the residence of the owner: some forms of tangible property also are assessed at their location.<sup>12</sup> More generally, however, the assessment of most forms of tangible personalty, and of all intangibles, is made at the residence or domicile of the owner. Annual assessments are made of all personalty, the date varying both as between states and as between administrative subdivisions within states. Real property presumably is reassessed at regular intervals; frequently, however, such assessments are really not revaluations at all, being simply copies of previous assessments.

d. *Administrative Officials and Procedure.* Obviously enough, the intricate duties involved in the assessment of property, the collection and equalization of assessments, the preparation of the tax

<sup>9</sup> See in this connection, J. P. Jensen, *Problems of Public Finance* (1924), Chs. XV and XVI.

<sup>10</sup> Lutz, *op. cit.*, 333. It should be noted, of course, that the structural arrangements here outlined are subject, in the several states, to the greatest of variation; this is true as to jurisdiction of local authorities, degree of supervision of the central government, mode of securing local assessors, and the competency and conclusiveness of boards of review.

<sup>11</sup> Tangibles are defined as those objects which are not easily concealed, such as lands, machinery, etc. Intangibles usually are indicated as money, credits, stocks, bonds, notes, mortgages, etc., the real value of which is in most instances only represented by the property.

<sup>12</sup> The machinery of manufacturing corporations in Massachusetts, all tangibles in Ohio if the owner lives in a county other than the one in which the property is located, logs and lumber in Washington, and certain other exceptions. See Lutz, *op. cit.*, 333.

bill, and the collection of the tax necessitates a rather elaborate administrative machinery. This task also demands close coöperation and coördination between the various administrative agencies if it is successfully performed.

(1) *The Assessor*. It is the function of this official to list and evaluate all property returned by the taxpayers. It may be done either upon personal inspection, return of the taxpayer, or tentative return subject to modification by the assessor. The method of selection of tax assessors varies; in a majority of cases this official is elected by the locality which he serves.

(2) *Boards of Review*. The returns of the tax assessors are, of course, occasionally inequitable; this is true because they are assembled from different taxing jurisdictions within the same local area. Boards of review consequently have been established, first, to correct and adjust the inequalities and defects of the original assessments among individuals, and second, to afford a more equitable and uniform basis of assessment among districts for the equitable distribution of county or state taxes.

(3) *The State Board of Equalization and the State Tax Commission*. In an attempt to sustain the general property tax, and to eliminate the grave inequalities resulting from the different valuation percentages in the counties or local subdivisions throughout the state, many states have established state boards of equalization. These boards have been replaced, in most instances, by state tax commissions, the functions of which are threefold: first, the state equalization of local assessments; second, the assessment of certain classes of corporate property;<sup>13</sup> third, the supervision of the original assessment as made by the local officials.<sup>14</sup> Further centralization has been accomplished in a number of states by placing the tax commission under the direction of a state department of finance. A commission of three members appointed by the governor with senatorial approval for fairly long terms seems to be the most ideal arrangement. Judicial review of the factual findings of these commissions has been a handicap and is an anomaly. "On the whole, however, the results of centralized administration in the taxation of real estate and corporate property," says Lutz, "have been favorable. Valuations have been increased, better meth-

<sup>13</sup> With the development of railroads and other forms of corporate activity, with extensive real property, local assessment became impracticable, if not virtually impossible.

<sup>14</sup> See in connection with the state tax commission, H. L. Lutz, *The State Tax Commission* (1918), Chs. V-XVIII. This gives an analysis of the organization and powers of the tax commissions of the various states.

ods of assessment have been developed, and some improvements effected in the equalization of tax burdens.”<sup>15</sup>

The general property tax was particularly suitable to an agricultural type of society. As long as land comprised the chief source of wealth, it was equitable in incidence and satisfactory in administration. While the structure of society has changed and the scheme of taxation has become exceedingly complex, the machinery for its administration has practically remained unmodified. The development of intangible property, an inevitable result of the industrial revolution, has so radically altered the operation of the general property tax that it has come to violate almost every known canon of taxation. This tax, in the first place, proposes “to apply a uniform tax burden to different classes of property which vary widely in productive powers, and which, moreover, are not all equally certain to be fully assessed.”<sup>16</sup> Serious inequalities in the distribution of the tax burden, even upon the basis of the fundamental premise of the general property tax—that property represents ability to pay—are produced. Furthermore, experience has demonstrated that these inequalities cannot be eliminated by the reform of the machinery of administration. The result has been literally to eliminate intangibles from taxation, as well as appreciably to reduce tangible personalty rendered for taxation.<sup>17</sup> It has led also to competitive undervaluation, resulting, in some instances, in making the tax actually regressive.<sup>18</sup> Moreover, it has resulted in wholesale evasion in many cases, through investment in non-taxable securities, migration to states especially lenient toward such property, or the establishment of taxing residences in sections of the state in which the tax rate is negligible.<sup>19</sup> In the second place, the general property tax has introduced, and its retention will continue, a very undesirable moral attitude toward the general property tax and ultimately, of course, toward all tax laws. “The advantage secured by dishonesty is so evident and so immediate, and the corresponding penalties for disclosure of one’s intangible property are so severe, that evasion is virtually forced upon the owners of such property.”<sup>20</sup> Thirdly, the very inequitable dis-

<sup>15</sup> *Ibid.*, 632.

<sup>16</sup> Lutz, *Public Finance*, 346.

<sup>17</sup> *Ibid.*, 340.

<sup>18</sup> Illinois Tax Commission, *Seventh Annual Report* (1925), 11 *et seq.*; also *Illinois Constitutional Convention Bulletin* (1920), “State and Local Finance,” No. 4.

<sup>19</sup> See in this connection the *Report of the Massachusetts Special Joint Committee on Taxation*, Senate Document 313 (1919), 44 *et seq.*

<sup>20</sup> Lutz, *Public Finance*, 349-350.



tribution of the tax burden which has resulted from the inadequate administration of the tax—an inadequacy which is inherent in the system itself, and therefore unremediable—among different classes of property, among different taxpayers, and among different localities, is not to be reconciled with the spirit of our institutions. Finally, the retention of the general property tax effectively has prevented the inauguration of more equitable and efficient systems of taxation by which the undesirable features of this method could be eliminated.<sup>21</sup> In brief, the general property tax is unsound in theory and unworkable in practice. It would not be desirable even if it were enforceable; in spite of this it is by far the most prevalent source of state and local revenue.<sup>22</sup>

2. *Modified Property Taxes.* The abuses inherent in the general property tax have caused several states to adopt a modified property tax which recognizes the diversified forms of property, and attempts to adjust rates and conditions of assessment to each form so as to distribute the tax burden in an equitable fashion not only as to the different classes of property but also as to the tax-paying capacity within each class.<sup>23</sup> The first basis of differentiation between forms of wealth is, of course, that recognized at law—realty and personalty. A second main division is that drawn between tangible and intangible personalty—the distinction between actual and representative property rights. There is a further distinction which may be noted, namely, that based upon the degree of mobility of the property. Certain forms of wealth are easily removed from a given taxing jurisdiction or hidden from sight when the tax burden is particularly heavy. This is especially true of intangibles, some forms of which are more easily concealed than others.<sup>24</sup> On

<sup>21</sup> Statistics giving the relative importance of the different sources of revenue may be obtained from the reports of the various state tax commissions and also from the periodic reports of the Bureau of the Census on *Wealth, Public Debt, and Taxation*, the most recent being in 1922. See "Assessed Valuation and Tax Levies," 7.

<sup>22</sup> See in this connection, E. R. A. Seligman, *Essays in Taxation* (9th Ed., 1921), Ch. II; "Report of Committee on Causes of the Failure of the General Property Tax," *Proceedings Fourth National Tax Conference* (1910), 299; also C. J. Bullock, *Selected Readings in Public Finance* (2nd Ed.), 283.

<sup>23</sup> Lutz, *Public Finance*, 352. Concurrently with the growth of the sentiment favoring the modified property tax there developed a distinctly favorable attitude toward the single tax. The experience of Canada during the war has demonstrated the fiscal unreliability of such a tax system and it is not now seriously regarded as a legitimate scheme of governmental finance. See *Proceedings Fifteenth National Tax Conference* (1922), 86 *et seq.*

<sup>24</sup> For instance, concealment of a mortgage where registration is required is probably more dangerous than concealment of an unrecorded note.

this basis, property taxes might be grouped into: (1) taxes on intangible personalty, (2) taxes on tangible personalty, and (3) taxes on realty.

About the most that can be done with reference to the first class is the imposition of a flat rate so low as to make concealment trivial, the assessment of a penalty upon intangible property not registered for assessment at the time of its distribution upon the death of its holder, and reliance upon the general honesty of the people.<sup>25</sup> The tax on tangible personalty may be based on its mobility and the desirability of favoring certain of its forms.<sup>26</sup> This is done, of course, to avoid tendencies toward sequestration and migration, and also to encourage certain domestic activities. Realty taxation also has been subject to considerable reform. The haphazard method of classification and appraisal of real estate by local officials has not been satisfactory. It has frequently resulted in considerable realty not even being listed; revaluation has been too infrequent and has generally not taken into account shifts and trends in property values.<sup>27</sup> Politics and the incompetence of local officials have also been aggravating factors.

The remedy for this situation must undoubtedly be sought through central administration by a thoroughly competent and authoritatively endowed state tax commission and through a scientific method of land appraisal. The essentials of a scientific system of land appraisal may be briefly stated as follows: (1) the development of a comprehensive system of land classification based upon its uses and productivity; (2) the collection of more complete data on land values, including the yield per acre and sale statistics;<sup>28</sup> (3) the introduction of the practice of continuing assessment by skilled assessors working under the direction of the state tax commission throughout the year;<sup>29</sup> (4) a general readjustment of the size of the assessment district;<sup>30</sup> (5) the extension of central control over assessment; (6) the separate assess-

<sup>25</sup> Connecticut has found this plan reasonably satisfactory.

<sup>26</sup> The Minnesota plan gives capital goods and tools used in farming most favorable treatment; second, household goods, personal and domestic belongings are favored slightly less; in the third class come capital goods used in merchandising and manufacturing.

<sup>27</sup> See in this connection South Carolina Tax Commission, *Report* (1915), 22 *et seq.*; also *Report of the Joint Special Committee on Revenue and Taxation of South Carolina* (1921), 45.

<sup>28</sup> This practice has long been in use in Wisconsin and a number of the states.

<sup>29</sup> Maryland had only five reassessments in the nineteenth century.

<sup>30</sup> The assessment district is rather small except in the South where the county is the unit.

ment of lands and improvements; and (7) a special technique for assessing city property, including tables of sizes and values of lots and standards for judging the value of buildings.<sup>31</sup>

3. *State Taxation of Income.* While the proceeds from state income taxes are comparatively negligible at the present time, it is generally agreed that this type of a tax will in the future constitute a much larger percentage of state revenues. Since 1911 fourteen states have either modified or adopted tax plans involving a levy upon personal incomes as such;<sup>32</sup> however, only twelve states are now levying a tax upon the incomes of individuals. This tax, as it has been adopted by different states, has assumed three typical forms.

(1) *The Wisconsin plan* imposes a tax on all incomes, individual and corporate, earned or produced within the state. The situs of the income rather than the residence of the owner is thus made the test of the tax. The rates are progressive and separate schedules are provided for individuals and corporations. Certain very low exemptions are allowed for individuals; no corporate exemptions, however, are permitted.<sup>33</sup> It is obvious that the intention of this tax is to displace the general property tax for state purposes.<sup>34</sup>

(2) *The Massachusetts income tax* applies only to certain types of incomes.<sup>35</sup> Variations in rates are made for incomes derived from taxable intangibles, annuities, trades, and professions. This tax is intended only to supplement the general property tax rather than to displace it. It secures contributions from a large group of non-property-holding residents.<sup>36</sup>

(3) *The New York income tax law* applies to the income of all residents from all sources, and to the income of non-residents which is produced within the state.<sup>37</sup> Certain reciprocal agree-

<sup>31</sup> See Report of the Committee on the Assessment of Real Estate, *Proceedings of Fifth National Tax Conference* (1911), 350 ff., and H. L. Lutz, "The Somers System of Realty Valuation," 25 *Quar. Jour. of Eco.*, 172 (1910).

<sup>32</sup> H. L. Lutz, "The Progress of State Income Taxation since 1911," 9 *Am. Eco. Rev.*, 66 (1920). Ten states levy upon both personal and corporate income, while three levy only upon corporate income. See E. E. Witte, "Federal and State Income Tax Laws," 9 *Bulletin of the National Tax Association*, 43 (1923).

<sup>33</sup> See in this connection *Laws of Wisconsin* (1911), Ch. 658.

<sup>34</sup> A general property tax offset was allowed to protect the income tax in its infancy. It was opposed by the state tax commission and was finally repealed. See *Report* (1918), 6 ff.

<sup>35</sup> See *Laws of Massachusetts* (1916), Ch. 269.

<sup>36</sup> See the *Report of the Massachusetts Joint Special Committee on Taxation* (1919), 46 ff.

<sup>37</sup> See *Laws of New York* (1919), Ch. 627.

ments are made with other states to avoid double taxation of citizens. The New York law follows the federal law rather closely as to the determination of income and exemptions, and the rate imposed is moderately progressive. One-half of the yield of the tax above expenses is distributed to the counties on the basis of assessed valuation; the state retains the rest. The New York system seems to occupy a place midway between the Wisconsin and Massachusetts schemes since it applies to all types of income and at the same time retains the property tax.

Whatever the purpose of the income tax may be, whether to displace the general property tax or to supplement it, one of its main objects is to force every person possessing taxing ability to pay something toward the support of "the government under which he is domiciled or from which he receives the personal benefits that government confers."<sup>38</sup> Certain problems, of course, arise in connection with the levying and collection of this tax. What persons should be subject to the tax? From an administrative point of view, it is generally agreed that it should apply only to residents. What should be the basis of its levy? Should it be based on net income from all sources as in New York, or on certain forms of income as in Massachusetts, or only on income originating within the state? The choice among these methods must depend upon the purpose in mind—whether the income tax is to be the chief basis of taxation or merely a supplementary tax. How shall taxable income be determined? By crude and inaccurate external indications of taxable capacity, or by collection at the source, eliminating a return of income by the taxpayer as is the case in Great Britain, or by assessment on the basis of the taxpayer's declaration? The last method is generally followed in the United States; it has been recommended, however, that it be determined as a good accountant would determine it.<sup>39</sup> Again what should the personal exemptions be? The cost of a reasonable standard of living for the individual or family is generally regarded as the proper basis for exemptions. Of course, centralized administration is necessary for the effective administration of this tax.

4. *Corporation and Business Taxes.* One of the most popular methods of raising state revenue is the tax upon corporations. There exists a general conviction that corporations by their political influence and various devices or subterfuges escape their just

<sup>38</sup> Report of Committee on Model Tax System, *Proceedings of the Twentieth National Tax Conference* (1919), 429.

<sup>39</sup> *Ibid.*, 440.



share of the tax burden. They generally hold highly specialized forms of both tangible and intangible property which is exceedingly difficult for local assessors to discover and value for assessment. The corporation tax is usually levied upon the property of the corporation, its income, or its franchise to do business in the state. Railroads are generally taxed upon the basis of property values or gross income or receipts. The taxing of a manufacturing corporation does not present the difficulties involved in taxing public service corporations whose tangible properties frequently constitute the smallest part of their assets. Their franchises are their most valuable assets. Hence they are taxed in some states on their gross receipts; in others on net income; and in some instances on their capital as representing the total value of their property including the franchise.<sup>40</sup> Of course, the taxing of public-service corporations is intimately related to their service charges which in some states are left to the control of special commissions. In many of the Southern States, Delaware, and Pennsylvania, business taxes of various kinds are levied upon different professions and occupations, sales of merchants and manufacturers, and the value of ores mined. Some states, Louisiana and Arkansas, levy a severance tax upon the production of natural resources such as oil, gas, lumber, sulphur, and phosphates.<sup>41</sup>

5. *Inheritance and Estate Taxes.* Beginning with the New York Statute of 1885, the first comprehensive law on the inheritance tax in the United States, the principle of the inheritance tax has been extended until it is now operative in every state in the Union except Florida, Alabama, and Nevada. The theory of this tax is that the rights of bequest and inheritance are civil rights bestowed by the state and that it can in the absence of self-imposed limitations destroy or abridge them. The inheritance tax is a levy upon the transfer of property at death; its incidence falls upon the beneficiary. There is usually a graduation of exemptions based upon the amount of the inheritance and the strength of the claims of the different classes of heirs. Direct heirs are treated more favorably than collateral relatives. This tax applies to both realty and personalty. The transfer of the former is governed by the laws of the state in which it is located while that of the latter is regulated by the laws of the state of domicile.<sup>42</sup> An estate tax is levied

<sup>40</sup> R. C. McCrea, "The Taxation of Transportation Companies in the United States," 15 *Annals of the Am. Acad. of Pol. and Soc. Sci.*, 355-380 (1900).

<sup>41</sup> Seligman, *op. cit.*, Chs. V-VIII.

<sup>42</sup> Lutz, *Public Finance*, 475.

upon the aggregate of the estate at death whereas an inheritance tax is regulated somewhat by the basis of distribution.

6. *Consumption Levies.* The states are, at the present time, exhibiting a marked tendency toward the inclusion of levies upon consumption in schemes of state taxation. Chief among such levies is, of course, the gasoline tax, which is levied in every state at the present time.<sup>43</sup> "This commodity presents well-nigh ideal conditions for the use of an excise tax. Its consumption is universal, it is handled by large scale producers and distributors, and there is a fairly equitable relationship between the fuel consumption of the motor engine and the wear and tear on the highways resulting from modern motor vehicle traffic."<sup>44</sup> Ten states levy also a tobacco tax.

7. *Miscellaneous Sources of Taxation.* A number of states at the present time levy capitation or poll taxes; such taxes are levied, of course, upon persons as such at so much per person. The payment of this tax is generally made a prerequisite to voting. It is primarily a tax of the Southern States and a large portion of it goes to the public school fund. Its fiscal importance is almost negligible. The eleven states levying it derived in 1926 slightly more than three and one-half millions in revenue from it. There are also certain non-business license taxes, the most important of which is the tax on motor cars.<sup>45</sup> The tendency is toward decreasing the tax on automobiles and increasing the gasoline tax. Hunting, fishing, and the ownership of animals are also regulated under this tax. Many states levy a mortgage-recording tax, which is occasionally a substitute for the taxation of mortgages as intangibles, and sometimes is supplementary to it. There are also certain taxes levied upon property without regard to value, such as a tax upon land per acre or cattle per head; needless to say, such taxes are not general, nor is their fiscal importance significant.

#### IV. THE LIMITATIONS UPON THE TAXING POWER OF THE STATES

There are only two express limitations in the Constitution of the United States upon the taxing powers of the states. No state

<sup>43</sup> J. W. Martin, "The Administration of Gasoline Taxes in the United States," 13 *Nat'l. Mun. Rev.*, 587 (1924). *Annual Report of the N. Y. State Tax Com.* (1927), 630.

<sup>44</sup> Lutz, *Public Finance*, 425.

<sup>45</sup> See H. A. Barth, "State Taxation of Passenger Automobiles," 13 *Nat'l. Mun. Rev.*, 641 (1924). In 1926 approximately 234 out of 244 millions derived from non-business license taxes came from the taxation of motor vehicles.

can tax imports or exports, without the consent of Congress, except to provide funds for the execution of its inspection laws. To prevent the abuse of this power it is provided that the net proceeds of such a tax shall be paid into the treasury of the United States. No state is permitted to levy tonnage duties upon vessels entering its ports.<sup>46</sup>

Further limitations, however, result from the operation of certain provisions of the Constitution. No state may deprive any person of property without due process of law or deny the equal protection of the law to any person within its jurisdiction,<sup>47</sup> or pass any law impairing the obligation of contract. Also, "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States."<sup>48</sup> This is known as the "comity" clause of the Constitution and prevents a state from taxing either the property or business of citizens of other states more heavily than that of its own citizens. Furthermore, there are implied limitations to the effect that a state may not use its taxing power to interfere with the operation of the agencies of the government of the United States,<sup>49</sup> and that being unable to give extra-territorial effect to its laws, it may not tax property without its jurisdiction.<sup>50</sup> A state cannot tax the property of the Federal government,<sup>51</sup> the salaries of its officials,<sup>52</sup> its franchises,<sup>53</sup> securities,<sup>54</sup> or incomes from its securities.<sup>55</sup>

Generally there are limitations upon the taxing powers of the states in their own constitutions. One of these is that taxes must be for a public purpose. The legislature, of course, is judge of what is a public purpose, though in cases of doubt it becomes a judicial question. The courts, however, will defer to the judgment of the legislature unless it is clear that it has overstepped its constitutional authority. The ballot box is the main remedy in this matter.<sup>56</sup> Another limitation is that taxes must be levied with equality and uniformity. Taxation is considered the equivalent for the protection which the government extends to both persons and

<sup>46</sup> *The Constitution*, Art. I, Sec. 10, Cl. 2.

<sup>47</sup> *Ibid.*, Art. XIV, Sec. 1.

<sup>48</sup> *Ibid.*, Art. IV, Sec. 2, Cl. 1.

<sup>49</sup> *McCulloch v. Maryland* (1819), 4 Wheaton 316.

<sup>50</sup> See Thomas M. Cooley, *Constitutional Limitations* (8th Ed., 1927), II, 986-1016.

<sup>51</sup> *Van Bracklin v. Tennessee* (1885), 117 U. S. 151.

<sup>52</sup> *Dobbins v. Commissioners* (1842), 16 Peters 435.

<sup>53</sup> *California v. Central Pacific Ry. Co.* (1888), 127 U. S. 1.

<sup>54</sup> *Weston v. Charleston* (1829), 2 Peters 449.

<sup>55</sup> *Pollock v. Farmers' L. & T. Co.* (1895), 157 U. S. 429.

<sup>56</sup> Cooley, *op. cit.*, II, 1029.

property, and since all are equally protected, the burden of government should rest alike upon all. Furthermore, the right of a state to tax an object depends upon its jurisdiction over the object. This jurisdiction rests upon the actual or constructive presence of the object within the state's territorial limits. There is no trouble about this matter with reference to real property. Constructive presence applies to personal property and is determined by the principle *mobilia sequuntur personam* (goods follow the person). It may happen, therefore, that personal property may be actually present in one state and constructively present in another, resulting in double taxation.<sup>57</sup> Double taxation of the same piece of property by the same state viewed in the same aspect is forbidden by the constitutions of most of the states and by the Fourteenth Amendment.

## V. BUDGETARY FORMATION AND CONTROL

"The need for a budget system in controlling the finances of state governments is now admitted by practically every one."<sup>58</sup> Forty-seven states have by either statute or constitutional amendment established some form of budgetary control. While various states have modified their budget laws or substituted new laws for previous enactments, no state has abandoned the budget system. This is convincing evidence that it has vindicated its usefulness and should be made a permanent feature of state government. To eliminate it from debate and place it beyond the control of politics, it should be given a constitutional status. Only general provisions as to budgetary formation and control should be placed in the constitution, leaving details to supporting legislation.<sup>59</sup>

1. *Budget Formation.* On the basis of the agency formulating the budget, there are at the present time among the several states three fairly distinct types of budgets: first, the legislative budget, formed and presented by a joint legislative committee;<sup>60</sup> second, the board or commission budget, prepared by a board or commission, representing both the executive and the legislature, or, as in

<sup>57</sup> *Coe v. Errol* (1886), 116 U. S. 517.

<sup>58</sup> A. E. Buck, "The Budget," *A Model State Constitution* (1922), 31 (Nat'l. Municipal League).

<sup>59</sup> *Ibid.*, 32. Only six states as yet have incorporated budgetary provisions in their constitutions: California, Maryland, Massachusetts, Nebraska, West Virginia, and New York. W. F. Dodd, *State Government* (2nd Ed., 1928), 258.

<sup>60</sup> Arkansas is the only state following this procedure; New York abandoned this form for the executive budget in 1927.



Texas, independent of both;<sup>61</sup> and third, the executive budget, formulated under the direction of the governor as the chief administrative agent of the state.<sup>62</sup>

Of these three types, the executive budget is by far the most desirable. In the first place, it fixes responsibility for the budget primarily in the governor who is responsible for his administration. In the second place, he through his subordinates is in the best position to secure the necessary information for formulating the fiscal policy of the government. In the third instance, it, of course, leaves final determination to the legislature, and, therefore, does not violate the doctrine of separation of powers. Finally, it follows the practice of the leading governments of the world.<sup>63</sup>

The successful operation of the executive budget system largely depends upon the prevalence of certain conditions.<sup>64</sup> It presupposes a well-organized administrative system whose heads of departments are responsible to the governor. This is necessary to make possible both the preparation of the budget and its administration after the proposed appropriations have been made by the legislature. It is further assumed "that the governor will have a permanent staff agency either in a department of finance or attached to his office, which will work under his direction in the preparation of the budget and will be engaged in gathering budget information throughout the year."<sup>65</sup> It is also necessary for all state agencies of whatever character receiving state funds for their operation to be required to furnish the governor such information as he may request as a basis for the preparation of the budget. The governor should be allowed to present the budget to the legislature in the form of a general appropriation bill containing the proposed expenditures and also a bill or bills covering the recommendations for whatever additional revenue the budget proposal makes necessary.

The budget is a careful statement of the proposed expenditures and probable income of the state for a definite period, usually

<sup>61</sup> About one-third of the states use this method.

<sup>62</sup> See F. G. Bates and O. P. Field, *State Government* (1928), 252-254. More than half of the states have adopted this form.

<sup>63</sup> F. A. Cleveland and A. E. Buck, *The Budget and Responsible Government* (1921), *passim*.

<sup>64</sup> See A. E. Buck, "The Present Status of the Executive Budget in the State Governments," 8 *Nat'l. Mun. Rev.*, 422-485 (1919).

<sup>65</sup> A. E. Buck, "The Budget," *Model State Constitution*, 32-33. In Illinois the governor is assisted by the director of the department of finance in which a budget bureau is located. In Virginia he is assisted by a budget officer and numerous assistants. See A. E. Buck, "The First Virginia Budget," 9 *Nat'l. Mun. Rev.*, 207 (1920).

accompanied by comparative tables for a previous similar period. The initial step in the process of its formation is the preparation of the departmental estimates.<sup>66</sup> These are generally prepared under the direction of the head of these agencies or some one of their officials designated as a budget official. These estimates are presented to the budgetary agency which conducts hearings in which the heads of departments and bureaus are permitted to support their recommendations. The budget agency determines the final estimates to be recommended in the budget message of the governor to the legislature; though in some instances the budget agency's power of revision of the departmental estimates is to some degree limited.

The legislature ordinarily may increase, decrease, or omit entirely items in the proposed budget; though in some states it is properly restricted to the reduction or omission of items. In some instances more radical changes require a three-fifths vote of each house. However, if the governor has the item veto including the power of reduction of items, he is in position to defend himself against increases in his recommendations. "Since budget reform is not designed to destroy the legislature's ultimate control of the purse, but rather to provide conditions under which such control effectively may be exercised, it hardly seems wise," says Holcombe, "to impose undue restraints upon its power to amend the budget."<sup>67</sup>

2. *Budgetary Control.* The completion of the task of budgetary formation and providing for the operation of the budget by appropriations constitute only a part of the task of the successful execution of a state fiscal system. Possibly more important even than budgetary formation is the control of the expenditures under the budget after it has been adopted. It is at this point that many state budgetary systems break down. It has been said, with a good deal of truth, that "a large majority of the states are no better off from the standpoint of financial planning and control than they were before they provided for the establishment of a budget system."<sup>68</sup> Undoubtedly a scientific system of budget formation and proper restrictions over budget legislation are a great advance over the previous chance management of these matters by legislative committees. Such a reform stops short of the mark if effective

<sup>66</sup> Frequently legislative, judicial, and educational expenditures are treated separately from the rest of the budget.

<sup>67</sup> *State Government in the United States* (Rev. Ed., 1926), 331.

<sup>68</sup> A. E. Buck, "State Budget Progress," 10 *Nat'l. Mun. Rev.* 568, (1923).

control of expenditures is not provided.<sup>69</sup> The spending agencies should be required to establish reserves which could only be used by the permission of the budget agency or to present periodical estimates for its approval before the money for such purposes becomes available. "Even though many states at present have only 'paper' budget systems, such states have at least recognized the utility of the budget principle. Sooner or later there is strong likelihood that these paper plans will be vitalized, improved, and put into actual practice. An important step in the reconstruction of state government will then have been consummated."<sup>70</sup>

<sup>69</sup> In Nebraska, for instance, no appropriation becomes available for use until the spending agency has submitted quarterly estimates, and these estimates have received the sanction of the governor.

<sup>70</sup> Holcombe, *op. cit.*, 333.

## CHAPTER XXXVII

### THE REORGANIZATION OF STATE ADMINISTRATION

A Governor with a Cabinet of reasonable size, responsible for proposing a program in the annual budget and for administering the program as modified by the Legislature, may be brought daily under public scrutiny, held accountable to the Legislature and public opinion, and be turned out of office if he fails to measure up to public requirements. If this is not democracy then it is difficult to imagine what it is.

—REPORT OF NEW YORK RECONSTRUCTION COMMISSION.

#### I. THE DEFECTS IN A TYPICAL STATE ADMINISTRATIVE SYSTEM

An unprecedented expansion in the functions of state government in recent decades has necessitated the establishment of new machinery for state administration. In attempting to solve this problem legislatures have generally proceeded without systematic planning or without vision of the working relationships that should exist among the separate units of an administrative system, and in most cases have created additional agencies for the performance of each new activity. There has been no uniformity in the organization of these new agencies and little attempt to correlate and unify their work. The typical administrative system now presents the spectacle of numerous disconnected and conflicting offices, boards, and commissions. Prior to the reorganization in Illinois in 1917, there were in that state more than one hundred and twenty-five independent agencies of state government. In New York in 1919 there were one hundred and eighty-seven such agencies. The evils of this situation were accentuated by the failure of most states to accompany the multiplication of functions and agencies with a scientific organization of the personnel and financial systems of state government. The most glaring defects found in these unorganized administrative systems of the states may be summarized as follows:

First, there is the lack of coördination and correlation among services. The disintegrated form of organization, in which inter-



related services are not grouped and subjected to overhead control, inevitably results in much overlapping of functions and duplication of effort and equipment. The separation of agencies increases the costs of those activities which are essential to all services, such as purchasing, bookkeeping, and supervision, and prevents the effective use of common materials. Coöperation between related services is rendered difficult by the divisions in organization, and rivalries displace "hand in glove" action. Furthermore, there is no directing agency whose function it is to develop a program of work for all services within the same field of administration.<sup>1</sup>

Second, there is inadequate administrative control in the chief executive. It has previously been shown that the governor's control over administration has been restricted (1) by increasing the number of elected officials, (2) by vesting, in many cases, the power of appointment in other officials, (3) by limiting his power of removal, and (4) by failing to coördinate the terms of administrative officials with that of the governor.<sup>2</sup> Handicapped by these limitations, the executive's general supervisory and directory powers must depend on his personality and party influence. Legally, the governor is not the formulator of a broad administrative policy; rather, constitutions and statutes provide for the dissipation of his energies in a maze of administrative detail.<sup>3</sup> State administration is headless, or at best, multi-headed; therefore, unity in the administration of state affairs can be achieved only by haphazard legislative enactment of administrative regulations, by the subterranean channels of party coöperation,<sup>4</sup> or by the creation of still more commissions entrusted with the duty of supervising certain phases of state administration, such as finance, purchasing, or personnel. Under such a system responsibility eludes fixation, government becomes incomprehensible to the legislator and the

<sup>1</sup> See W. F. Willoughby, *Principles of Public Administration* (1927), 81-103.

<sup>2</sup> See Ch. XXXIV.

<sup>3</sup> "Theoretically the governor is the head of the government. He is supposed to plan the broad administrative policy. People think that he deals with large affairs. As a matter of fact his energy is consumed by trivial details of a clerical or subordinate nature. There is little time and strength left for the high functions of his office."—Alfred E. Smith, "How We Ruin Our Governors," 10 *Nat'l. Mun. Rev.*, 277-280 (1921).

"The only supervision provided over most of the executive offices, boards, and commissions, burdens the governor with a mass of unnecessary detail which no single individual can effectively handle."—*Report of the Efficiency and Economy Committee* (Illinois, 1915), 19.

<sup>4</sup> See a speech by Elihu Root on the "Invisible Government" in the New York Constitutional Convention on Executive Reorganization, August 30, 1915.

voter, and each service operates without effective direction or supervision.

Third, legislatures have failed to make provision for the recruitment and promotion of a trained personnel. The Jacksonian theory has prevailed and public office has remained party spoils in most American states. Regardless of the merits of the creed of rotation in office in Jackson's time, it is certainly not applicable in an age which requires technical proficiency in the administration of public affairs. State governments which have based the selection, promotion, and tenure of personnel upon personal favoritism and party allegiance have had to pay for the incompetence of employees and the consequent inefficiency of their services. The labor turnover involved is exceedingly expensive.

Fourth, prior to the second decade of the twentieth century the states had not provided for centralized control of fiscal functions, and as yet many of the states have succeeded in only partially correcting this defect. Until recently, a state budget system was unknown. The numerous spending agencies presented directly to the legislature their estimates of expenditures needed for the ensuing financial period. They padded their estimates and lobbied with the legislature for their approval. Beset by the importunities of rival agencies and lacking the advantage of a unified and ordered financial plan, legislative committees muddled through the estimates and passed a group of unrelated appropriation bills which were usually considerably mangled by the executive guillotine—the item veto. The same loose separatism prevailed in the expenditure of money. Each agency spent its money without central supervision, made its own purchases, and generally escaped an effective auditing of its accounts. The rising cost of state government finally made such methods intolerable and forced the adoption of an integrated system of handling public finance.

## II. THE MOVEMENT TOWARD REORGANIZATION

Dissatisfaction with the old type of state administration has been evidenced by the rise and spread of a movement for reorganization embodying clearly defined principles. This movement was initiated by the writings of scholars and unofficial organizations.<sup>5</sup> It received additional impetus in 1912 from the report of President Taft's Commission on Economy and Efficiency, which recom-

<sup>5</sup> Gustavus A. Weber, *Organized Efforts for the Improvement of Methods of Administration in the United States* (1919), 3-26.

mended changes in the grouping of departmental services and also the installation of a budget system in the national government.<sup>6</sup> Immediately the movement for "economy and efficiency" reached the states, and in less than six years commissions had been organized in about one-third of the states to make investigations and recommendations for the reorganization of their administrative systems.<sup>7</sup> Undoubtedly the most valuable studies that were made on the defects of state administration and the lines which reorganization should follow were those of the Illinois Efficiency and Economy Committee in 1915 and the New York Reconstruction Commission in 1919. After unsuccessful attempts to achieve reorganization in Oregon, Minnesota, Iowa, and New York, the Illinois legislature adopted in 1917 the first comprehensive plan of state administrative reorganization. Since 1917 similar reorganizations have been made in thirteen states, in the following order: Massachusetts, Nebraska, and Idaho in 1919; Washington and Ohio in 1921; Maryland in 1922; Pennsylvania, Vermont, and Tennessee in 1923; Minnesota in 1925; New York in 1926; and California and Virginia in 1927.<sup>8</sup> Administrative reorganization along the same lines has been proposed in about eighteen other states.<sup>9</sup>

### III. THE PRINCIPLE OF INTEGRATION

These reorganizations, although varying in method and extent, have proceeded "in the direction of setting up 'natural units' of administration, and binding them together by many expedients, the most important of which have signally enlarged the scope and intensity of the administrative leadership of the chief executive."<sup>10</sup> This tendency has been given the name of integration. An integrated administration has been defined as "that system where an attempt has been made to group all services whose operations fall

<sup>6</sup> See *House Documents*, 458 and 854, 62d Cong., 2d Sess., 1912.

<sup>7</sup> See F. A. Cleveland and A. E. Buck, *The Budget and Responsible Government* (1920), 92-99, for a summary of a monograph on the state movement for efficiency and economy prepared by Raymond Moley for the New York Bureau of Municipal Research and published as "Bulletin No. 90."

<sup>8</sup> For a summary of these reorganizations, see bulletin by A. E. Buck, *Administrative Consolidation in State Governments* (4th Ed., 1928), 6-32, 34-43.

<sup>9</sup> *Ibid.*, 32-34, 43-53. South Dakota has been listed with this latter group, even though a partial reorganization has been made. The extent of the reorganization, however, was not sufficient to justify listing it with those discussed here.

<sup>10</sup> Leonard D. White, *Introduction to the Study of Public Administration* (1926), 103.

in the same general field, and which consequently should maintain intimate working relations with each other, into departments presided over by officers having a general oversight of them all and entrusted with the duty of seeing that they work harmoniously toward the attainment of a common end. Under this system the line of authority runs from the several services to the departments of which they are subordinate units and from these to the chief executive or to the legislature whose jurisdiction extends over all the departments."<sup>11</sup> The various plans for state administrative reorganization seek to accomplish this process of integration by three interrelated programs: first, by unifying and departmentalizing the scattered administrative units; second, by increasing the administrative functions of the chief executive; third, by establishing an effective system of financial control.<sup>12</sup>

#### IV. THE DEPARTMENTALIZATION OF STATE AGENCIES

In the departmentalization of state services, certain rules should be followed. First, all functions which are purely administrative in character should be grouped in unifunctional departments. Second, the departmentalization of functions should be accompanied by a well-considered and consistent program of internal organization. Third, purely administrative work should be under the direction of single officials. It is conceded, however, that quasi-legislative and quasi-judicial functions should be performed by boards or commissions.<sup>13</sup> The part that each of these forms of organization should play in the reorganization of state administration has been admirably stated as follows: "The board has an undoubted rôle to play in the organization of departments where the outstanding objectives are continuity in policy, authoritative representation of interests, conference and consultation in view either of rule making or rule enforcement. On the other hand, where the objectives are prompt decision, vigor in action, unity of responsibility, the choice will naturally lie in favor of the single executive."<sup>14</sup>

These principles have not been consistently applied in all the states in which reorganization programs have been consummated;

<sup>11</sup> W. F. Willoughby, *Reorganization of the Administrative Branch of the National Government* (1923), 6.

<sup>12</sup> For a similar outline, see Frank M. Stewart, *The Reorganization of State Administration in Texas* (1925), 50.

<sup>13</sup> See Willoughby, *Principles of Public Administration*, Ch. VII.

<sup>14</sup> White, *op. cit.*, 168-169.



in some instances they have been only partially adopted.<sup>15</sup> Departmentalization programs have been compromised to a certain extent by personal and political factors, and by a desire in some cases to retain as much of the old system as was considered practicable, but chiefly by rigid, and in some instances complex, constitutional provisions. In only three states, Massachusetts,<sup>16</sup> New York, and Virginia, has departmentalization been preceded or accompanied by constitutional amendment; consequently, legislatures have had to refashion the state administrative machinery within constitutional stipulations framed for a disintegrated type of administration.

Nevertheless, many thorough reorganizations have been made. Numerous agencies have been consolidated into a restricted number of departments. Thus, the functions of more than one hundred agencies were consolidated under nine departments in Illinois,<sup>17</sup> the activities of more than one hundred and eighty under eighteen

<sup>15</sup> This discussion and that in the succeeding section of this chapter are based to a large extent on the material in A. E. Buck, *Administrative Consolidation in State Governments*. Use has also been made of the materials listed. On Illinois: "Civil Administrative Code of the State of Illinois," in H. B. Hurd, *Revised Statutes of the State of Illinois* (1923), Ch. 127, 1997-2012; J. A. Fairlie, "Illinois Administrative Code," 11 *Am. Pol. Sci. Rev.*, 310-315 (1917); Gov. Frank O. Lowden, "Reorganization in Illinois and Its Results," 113 *Annals*, 155-161 (1924). On Massachusetts: M. B. Lambie, "Administrative Control in the Commonwealth of Massachusetts," 113 *Annals*, 94-105 (1924). On Nebraska: A. E. Buck, "Nebraska's Reorganized State Administration," 11 *Nat'l. Mun. Rev.*, 192-200 (1922). On Idaho: Gov. D. W. Davis, "How Administrative Consolidation Is Working in Idaho," 8 *Nat'l. Mun. Rev.*, 615-620 (1919). On Washington: W. S. Davis, "The New Civil Administrative Code of Washington," 15 *Am. Pol. Sci. Rev.*, 568-576 (1921). On Ohio: W. F. Dodd, "Administrative Reorganization in Ohio," 15 *Am. Pol. Sci. Rev.*, 380-383 (1921). On Maryland: N. H. Debel, "Administrative Reorganization in Maryland," 16 *Am. Pol. Sci. Rev.*, 640-647 (1922). On Pennsylvania: C. L. King, "Fiscal and Administrative Reorganization in Pennsylvania," 17 *Am. Pol. Sci. Rev.*, 597-608 (1923). On Vermont: E. C. Mower, "Administrative Reorganization in Vermont," 18 *Am. Pol. Sci. Rev.*, 96-102 (1924). On Tennessee: A. E. Buck, "Administrative Reorganization in Tennessee," 12 *Nat'l. Mun. Rev.*, 592-600 (1923). On Minnesota: J. S. Young, "Reorganization of the Administrative Branch of the Minnesota Government," 20 *Am. Pol. Sci. Rev.*, 69-76 (1926). On New York: R. S. Childs, "New York State Reorganizes," 15 *Nat'l. Mun. Rev.*, 265-269 (1926). On Virginia: R. H. Tucker, "The Virginia Reorganization Program," 17 *Nat'l. Mun. Rev.*, 673-680 (1928). On California: W. W. Mather, *Administrative Reorganization in California* (1929). For a full bibliography to 1927, see Willoughby, *Principles of Public Administration*, 671-676.

<sup>16</sup> The Massachusetts amendment only authorized consolidation of agencies into twenty departments; it did not provide for the short ballot or abolish the board type of administration.

<sup>17</sup> Two additional departments were added in Illinois in 1925.

departments in Massachusetts, and the work of one hundred and five into fourteen departments and three commissions in Pennsylvania. In most of the states only a few independent statutory agencies among which were boards or commissions exercising quasi-legislative or quasi-judicial functions were retained. The Railroad and Public Utilities Commission in Tennessee, the Attorney General in Vermont, two statutory agencies in Idaho, six in Nebraska, and the trustees of the University of Illinois, the civil service commission, and several minor and temporary administrative statutory agencies in Illinois, were left independent. On the other hand, reorganizations in California, Pennsylvania, and a few other states failed to effect thoroughly integrated administrative systems.

Most of the states have confined reorganization to statutory agencies in order to avoid the task of amending their constitutions. However, New York and Virginia, by amending their constitutions, reduced the number of constitutional elective officers and removed other constitutional obstacles to reorganization. In a few states some of the duties of constitutional or elective officials were transferred to new departments. In still others the constitutional officers were included in the departments. Thus, in Massachusetts, four, and in New York, two, of the departments were headed by constitutional elective officers. Such a course has generally been considered undesirable because its effect is to diminish the governor's control over the departments.

The consolidation of agencies into departments necessitates an ordered internal arrangement of functions; in fact, any program of departmentalization is only half-complete which does not provide for a functional grouping of the departmental services. Some of the reorganizations "corraled" existing agencies into departments without attempting scientifically to organize the departments internally. Thus, merely a "round-up" of agencies was effected in Maryland. On the other hand, the more thorough reorganizations have consolidated functions rather than agencies, most existing services being abolished in order to allow a maximum of freedom in the internal organization of departments. A large measure of the responsibility for the internal organization has usually been relinquished by the legislature to the chief administrative officers. Thus, in Illinois the statute of reorganization provided only for departments, major officers, and departmental functions, leaving the actual internal structure and allotment of functions to the administrative heads. Similarly, in Idaho the in-

ternal arrangements were left largely to the heads of departments. Realizing that some flexibility was essential in internal arrangements, some of the states authorized certain officials to recommend or to make changes in departmental organization. For example, in California, the directors of the departments may with the approval of the governor rearrange functions within their departments from time to time. In other states the authority of the department head varies from mere regulation-making, alone or with the consent of the governor, to such authority as they exercise in California. A cabinet or similar body is sometimes entrusted with internal reorganization. Thus, in Washington, the governor and the ten department heads form an administrative board, one of whose duties is to systematize and unify the duties of various departments; and, in Pennsylvania, the governor and four department heads selected by him have the power to make internal readjustments. Sometimes, a special department, as the department of finance, has the power to investigate the activities of the departments and to propose or institute a more effective coördination of their work.<sup>18</sup> Some such scheme of progressive readjustment is necessary to maintain an efficient system of state administration.

There is considerable variation among the reorganized systems in the utilization and location of boards and commissions. First, in Tennessee, responsibility was concentrated in single officials, even for the performance of quasi-legislative and quasi-judicial functions except in the single instance of the Railroad and Public Utilities Commission. Second, in a few states some boards were retained but were left independent of departments. In Nebraska six statutory and several constitutional boards were left independent. Third, in most of the states boards and commissions were retained for varying types of work, but were attached to appropriate departments.<sup>19</sup> In many cases, particularly in Illinois, advisory boards were attached to the departments. The Illinois reorganization law provided for unpaid, advisory, and non-executive boards in the Departments of Agriculture, Labor, Public Works, Public Welfare, Public Health, and Registration and Education. The Ohio statute provided that department heads, with the consent of the governor, might create advisory boards at any time. Most

<sup>18</sup> Obviously, the exercise of this power should be subjected to the approval or supervision of the chief executive. This requirement was adopted by the framers of the above-mentioned programs.

<sup>19</sup> Washington adopted the unique scheme of grouping the elective state officers into nine administrative committees, and, therefore, provided for only a few boards for consultative purposes.

of the attached boards perform quasi-legislative or quasi-judicial functions. New York and Illinois have followed closely the principle that boards should be retained for quasi-legislative and quasi-judicial functions, that they should be substantially independent in exercising these powers, but that they should be attached to departments for administrative purposes. The Ohio statute sought to accomplish the same reconciliation of the demands for administrative and non-administrative services by endowing certain boards with autonomy in the performance of their quasi-legislative and quasi-judicial functions but attaching them to departments for administrative purposes by making the directors of the departments ex-officio secretaries of the boards and by declaring all their subordinate employees to be employees of the departments. In a few states, as in Pennsylvania, exclusively administrative boards were established in departments. Fourth, in a number of states, boards were made heads of departments. Thus, in Massachusetts, nine of the twenty departments, and in Maryland ten of the nineteen departments, are headed by commissions or boards, or by dual or triple headed executives. In Minnesota, nine of the thirteen departments are directed by commissions. It is unfortunate that this summary indicates that the scientific principles of administrative organization have not been constantly followed in these reorganized systems. Undoubtedly single directors should be used for administrative purposes and boards or commissions for only advisory or non-administrative functions. For legislative or judicial functions a board is more desirable than a single individual, but for administrative purposes unity of command is required for dispatch, efficiency, and responsibility.

## V. INCREASING THE ADMINISTRATIVE FUNCTIONS OF THE CHIEF EXECUTIVE

The concentration of administrative authority and responsibility in the governor is undoubtedly the outstanding object of successful reorganization programs. One advantage of departmentalization is that it simplifies the problem of unified control of the entire administration; the reduction of the number of administrative agents of the state and the unification of their activities in departments under single directors constitutes the first step in relieving the governor of an orgy of administrative detail and making him the formulator of policy of state administration and the supervisor of its execution. Further essentials for the accomplishment



of this result are necessary: first, the reduction in the number of elected officials; second, the further location of the power of appointment and removal in the governor; and third, the coördination of the terms of other administrative officials with that of the governor.

The greatest obstacle to the thorough reorganization of administrative machinery has been the constitutional provisions for several elected administrative officials in every state. The frontier philosophy that the people can intelligently elect a large number of officials and that popular election means popular control of government has been a plague to state administration. It is becoming increasingly evident that the constitutional requirement that the voters select state auditors, attorneys general, treasurers, secretaries of state, and the regulators of such matters as public utilities, highways, education, and public welfare is the chief reason for administrative inefficiency. The qualifications now demanded for administrative posts require specialized and technical training which is not ordinarily obtained by means of direct primaries. Nevertheless, state democracy generally chooses its administrative officials by thoroughly discredited political methods. Millions of voters of varying intellectual capacity and political intelligence are handed a ballot which may contain three or four hundred names and are expected to possess the requisite information for exercising selective judgment.

The results of this system are: (1) that many voters do not exercise the franchise because they feel helpless, (2) that the professional politician is made the advisor of many of those who do vote, (3) that special interests, economic, social, educational, or religious, are furnished an opportunity to determine the election results, (4) that irrelevant cross-currents are introduced into campaigns to the confusion of the voters, and (5) that government in the end becomes the agent of a high-powered and determined minority. It has been aptly said that the long ballot is "the apotheosis of corruption and irresponsibility." The whole system might be characterized as the noisy apotheosis of liberty and machinery. The result is a nominal rather than an actual democratic form of control. A democratic form of government to be effective demands not only the tacit consent but the active participation of the entire electorate.

The alternative to popular election is the vesting of the power of appointment and removal of administrative or non-policy-forming officials in the governor. Such a change would effectively con-

centrate the whole responsibility for administration in the governor and would facilitate rather than diminish popular control. Such a program is equally essential for the vitalization of the suffrage and for the efficiency of administration.<sup>20</sup> The governor could be held responsible then for both his accomplishments and his failures. A governor could be selected upon the basis of his policy instead of personalities. One of the saddest features of state politics is that gubernatorial campaigns are seldom based upon constructive issues. Furthermore, this change would simplify the problem of the electorate. Its task would be reduced to the selection of the governor and the legislature.<sup>21</sup>

Most of the reorganizations of the past two decades have not shortened the ballot because of constitutional provisions requiring the election of several administrative officials. The voters in New York approved, in November, 1925, an amendment which reduced the number of elective officials to four, the governor, lieutenant-governor, attorney-general, and comptroller. An amendment which provided that only the governor, lieutenant governor, and attorney general should be elected was ratified by the electorate of Virginia in June, 1928. These amendments were a part of the general reorganization of administration in these states.<sup>22</sup>

Although the constitutional elective officers were not touched by the reorganizations in other states, steps were taken toward increasing the governor's appointive and removal prerogatives. The states which have adopted consolidation programs may be roughly divided into two groups: first, those which have virtually made the governor the administrative head of the departmentalized functions and second, those which strengthened the governor's administrative position but placed emphasis on financial control.

The first group of states which includes a majority of those that have reorganized their administrative systems have solidified

<sup>20</sup> The selection of the auditor and the attorney-general present special problems. Since the auditor is to be a check on the governor, he should either be chosen by the legislature or the people, preferably the former, however. The attorney general is also sometimes considered a special problem. The two states which have recently adopted the short ballot by amendment, New York and Virginia, retained popular election of the attorney general.

<sup>21</sup> See C. A. Beard, *American Government and Politics* (5th Ed., 1928), 522.

<sup>22</sup> In Tennessee the only state officers elected by the people are the governor, supreme court judges, and members of the legislature, and railroad and public utilities commission; but three constitutional administrative officials are appointed by the legislature and the attorney-general is appointed by the supreme court.

the governor's position as head of the departments by giving him practically complete power of appointment and removal and by practically abolishing the distinctions between the terms of the governor and the other administrative officials. In Idaho all the departments are placed under single heads appointed by the governor alone and serving at his pleasure, except one whose head is appointed by the governor with the consent of the legislature for a two-year term. In Tennessee and Washington the departments are headed by single officials appointed by the governor with the consent of the senate and serving at the pleasure of the governor. In Ohio the departments are directed by single heads appointed by the governor and senate and serving at the pleasure of the governor, except that one head serves for one year and another for two years. In Nebraska there are single heads for all departments, all appointed by the governor with the consent of the legislature for two-year terms. In Illinois the departments are single-headed with their directors appointed by the governor and senate for four-year terms coterminous with that of the governor. California has single headed departments with directors appointed by the governor alone and serving at his pleasure, except that the director of the department of education is elected.<sup>23</sup> Vermont has four departments headed by boards appointed for overlapping terms, but the governor's power of removal is unlimited; all the heads of the departments are appointed by the governor and senate. In New York and Virginia the department heads are not under complete executive control, but this deficiency is partially overcome by the use of the short ballot.<sup>24</sup>

While the method of appointing subordinate officials in the reconstructed administrative systems varies, the lines of control run to the chief executive. The most common practice is to allow the heads of departments to appoint all or most of their subordinates, the lines of authority thus definitely running from the subordinate through the department head to governor. In some cases, the governor alone or the department heads with the consent of the governor appoint the subordinate officials, but in either case then the subordinate officials are under the authority of their respective departments.

In four of the states the governor has not been given such com-

<sup>23</sup> The governor's control over administration is limited in California by the fact that thirty-nine administrative agencies are still independent.

<sup>24</sup> In New York at least four of the departments are not under executive control, but two of these are under the elected officials.

plete power of appointment. In Maryland he can control only about one-half of the departments by appointment.<sup>25</sup> In Massachusetts and Minnesota, his control over administration is limited by the prevalence of boards with overlapping terms, in many cases longer than that of the governor. This situation is particularly true in Pennsylvania where the administrative boards existing within departments are practically autonomous units, except that they are subjected to financial control from the heads of the department. It has been claimed that this arrangement has the advantage of securing a "reasonable centralization of fiscal responsibility with a proper decentralization in administration."<sup>26</sup> Such a plan, however, does not provide the unity of responsibility which sound principles of administration demand. By way of summary, it may be said that, excepting the constitutional elective officials and a limited number of statutory, independent, administrative agencies, most of the reorganization programs have effectively concentrated and unified administrative authority in the chief executive.<sup>27</sup>

## VI. THE ESTABLISHMENT OF AN EFFECTIVE SYSTEM OF FINANCIAL CONTROL <sup>28</sup>

The astonishing rapidity of the increase in state expenditures in the twentieth century created an interest in financial organization and procedure which crystallized in a definite movement for budgetary control. This movement was a part of the general movement of administrative reorganization and aimed to affect economy in state expenditures by means of executive control in the allotment and use of public funds and of a unified program of state administrative agencies. Beginning with Wisconsin in 1911 the budgetary movement spread rapidly through the states. In fact, it has been more widely accepted than the other phases of the integration tendency. All the states except Mississippi have adopted some form of budget control. However, many of the states have

<sup>25</sup> See 11 *Nat'l. Mun. Rev.*, 219-220 (1922) for a brief characterization of the Maryland reorganization.

<sup>26</sup> See Buck, *Administrative Consolidation in State Governments*, 25. Also, C. L. King, "Fiscal and Administrative Reorganization in Pennsylvania," 17 *Am. Pol. Sci. Rev.*, 597-608 (1923).

<sup>27</sup> In some states the governor is assisted in the coordination of activities by the department heads sitting as a governor's cabinet. Reorganization laws have occasionally provided for the institution of the cabinet; in other cases, the governor has instituted cabinet meetings.

<sup>28</sup> In connection with this discussion, see Ch. XXXV.



not adopted sufficiently thorough reforms to insure complete and effective fiscal control.

1. *The Lines of Financial Control.* To accomplish the desired aims of budgetary control it is necessary to provide concentrated executive responsibility for (1) budget planning and (2) for budget execution. Budget planning should aim to give a consolidated statement of estimates and to strike a balance between anticipated revenues and requested appropriations. It should also indicate by the proper classifications and summaries the cost of the various activities in which the state engages in order to present a clear and understandable picture of the accomplishments to be expected from the funds appropriated.<sup>29</sup> To meet these requirements the budget agency must be able to acquire information concerning the activities of the administrative agents with facility and be given ample power of revision of the estimates. The power of revision is a necessary concomitant of planning; and yet, many of the states have weakened their budget systems by conferring upon the budgetary agency only the power to review or a limited power to revise the estimates.<sup>30</sup>

Budget execution requires the supervision of operations after the appropriations have been granted by the legislature. Most of the states have not provided for adequate control of this phase of the budget; only a few have placed such control squarely and completely under the governor. Such supervision requires continuous executive control of (a) administrative accounting, (b) purchasing, and (c) personnel.<sup>31</sup> Administrative accounting must be distinguished from the technical audit; the purpose of the latter is to see that expenditures are made according to law<sup>32</sup> while that of the former is to enforce a system of accounting as a means of keeping constant tab on the financial status, plans, and methods of the spending agencies.<sup>33</sup> The auditing agency should be independent of the administrative departments as it is primarily the agent of the legislature, while the accounting system should be

<sup>29</sup> See Lent D. Upson, "Half-Time Budget Methods," 113 *Annals*, 69-74 (1924).

<sup>30</sup> Writing in 1921, A. E. Buck said: "Practically all of the state budget laws require the budget-making authority to review the estimates, but less than half of these laws expressly confer upon this authority the power to revise the estimates in the preparation of the budget."—*Budget Making*, 109.

<sup>31</sup> Buck, *Budget Making*, 170.

<sup>32</sup> The auditor should logically be responsible to the legislature.

<sup>33</sup> See Buck, *Budget Making*, 186, and W. F. Willoughby, *Principles of Public Administration*, 535.

under the direction of a superior administrative official. It should be a part of a financial department.

Administrative accounting is accomplished through frequent cost and operation reports to the fiscal authority by the spending agencies. In order that these reports may give the requisite information to the fiscal authority, it should be given the authority to devise uniform methods of accounting and standard classifications of appropriation items. Different methods are employed by the states in the exercise of this authority. In some cases, as in Ohio, transfers from one appropriation item to another may be made only with the consent of supervising agencies.<sup>34</sup> In Illinois the Department of Finance is given the authority to approve or disapprove all vouchers and to pass upon the prices, quality, and amount of articles purchased or labor used to see that they "are fair, just and reasonable."<sup>35</sup> In some states, however, such control is not extended to individual items of expense, but to general expenditures. Some control of this nature is essential to secure the best results from the budget system.

The movement for centralized purchasing began in the United States in the last years of the nineteenth century, when Iowa, Texas, and the city of Chicago took steps in that direction. It became a part of the general economy and efficiency movement of the second decade of the twentieth century and by 1925 about three-fourths of the states had established centralized purchasing agencies. In some states, they purchase practically all the supplies and in others only a part.<sup>36</sup> The advantages of centralized purchasing are: (1) large-scale buying, resulting in economies and prompt delivery; (2) the standardization of supplies, thus eliminating expensive grades; and (3) the elimination of politics and favoritism by means of competitive bidding.<sup>37</sup> A centralized purchasing agency should be a part of every budget system.

Furthermore, a program for an economical and efficient administration must provide for supervision of the expenditure for employment. There are at least three phases of this problem:<sup>38</sup> (1) the determination of the number of employees to be used to perform a given piece of work; (2) the classification of employees

<sup>34</sup> See R. E. Miles, "Fiscal Control in Ohio," 113 *Annals*, 105-112 (1924).

<sup>35</sup> Civil Administrative Code of the State of Illinois, in H. B. Hurd, *Revised Statutes of the State of Illinois* (1923), Ch. 127, 1997-2012.

<sup>36</sup> See Milton Conover, "Centralized Purchasing Agencies in State and Local Governments," 19 *Am. Pol. Sci. Rev.*, 73-82 (1925).

<sup>37</sup> Buck, *Budget Making*, 177-178.

<sup>38</sup> *Ibid.*, 171-177.

as a basis for compensation and promotion; and (3) the selection and retention of meritorious employees. Ten states now have competitive civil service systems and a central agency charged with the administration of the personnel problem. A few other states exercise some central control over employment but do not follow the merit principle in selecting their employees. For example, in the state of Washington the Department of Efficiency may frame employment classifications, regulations, and standards.<sup>39</sup> This, however, is not a substitute for the merit system.

2. *The Agency of Financial Control.* Financial control should be exercised by a special staff agency of the governor. There is considerable variation among the states in the degree of financial unification, the extent of concentration under the governor, and the agencies of supervision. One of the most efficient and most widely copied plans is found in Illinois where budgetary control is exercised by the Department of Finance whose director is appointed by the governor and the senate. The director is the agent of the governor in the framing of the budget; in performing this function he has plenary power to make inquiries and investigations and to revise the estimates of the departments. This department may prescribe a uniform system of bookkeeping, accounting, and reporting for the spending departments, and examine and approve or disapprove their vouchers, bills, and claims. In settling the accounts of the departments it may "inquire into and make an inspection of articles and materials furnished or work and labor performed, for the purpose of ascertaining that the prices, quality and amount of such articles or labor are fair, just and reasonable, and that all the requirements, express and implied, pertaining thereto have been complied with, and to reject and disallow any excess." Furthermore, it may investigate duplication in the departments and the character of their work, and formulate plans for a better coördination of their activities.<sup>40</sup>

The purchasing agent is often separate from the budget framing agency. Buck lists the general types of purchasing agencies in the order of their efficiency as follows: (1) division of a department under a centralized administration; (2) independent department or bureau headed by a single responsible officer; (3) a board of appointive or *ex-officio* members.<sup>41</sup> While purchasing in Illinois

<sup>39</sup> For a fuller discussion of the merit principle in selecting state employees, see Ch. XXXIV.

<sup>40</sup> Civil Administrative Code, *op. cit.* See also, White, *Public Administration*, 115-123.

<sup>41</sup> Buck, *Budget Making*, 181.

except for highway supplies is under the Department of Purchases and Construction, the Department of Finance may prescribe certain rules in regard to purchasing, check the cost of purchases against current prices, and keep tab on the quantities purchased and delivered.

Civil service administration is ordinarily placed under a separate agency, though in some instances it is connected with the department of finance or similar agency. There is, however, a separate civil service commission in Illinois.

#### VII. RESPONSIBILITY OF THE CHIEF EXECUTIVE UNDER REORGANIZATION PROGRAMS

The examination of the reorganization movement indicates that its chief purpose is to make the governor the effective head of state administration. It aims to transform a disintegrated and irresponsible system into an integrated and responsible administrative mechanism. Such concentration of power in the hands of the governor is regarded in some quarters as dangerous. This apprehension is not well founded. In the first place, the old safeguards of impeachment and the recall may well be retained for extraordinary occasions. In the second place, an independent auditing system serving as the watchdog of the legislature is a check against the diversion or peculation of public funds. In the third place, the governor and heads of departments could be made subject to interpellation by the legislature. Legislative investigation by committees is not without merit. Furthermore, the concentration of power in the governor simplifies and facilitates its control, whereas the diffusion of power aggravates the problem of fixing and enforcing responsibility for its exercise. It is more difficult to control a half-dozen executive officials than one.

#### VIII. MEN AND LAWS

To a large extent, however, the success of reorganization plans must depend on the attitude of the chief executive and the legislature. The most perfect plan of government will operate successfully only under sympathetic leadership. In spite of the American theory of "a government of laws, not of men," it must be recognized that governments are not self-operating pieces of mechanism and can be no better than the type of men who administer them. However, it must be admitted that a machine which is



structurally perfect can be more successfully operated than one whose parts can not function as a unit. This is true with governments. The reorganized administrative systems during the few years of their operation under able administrators have proved themselves much more efficient and responsive than the old and disjointed organizations under the direction of men trained only in the "diplomacy of the political guild."<sup>42</sup>

#### IX. COMMISSION PLANS OF REORGANIZATION

A few states have adopted reorganization programs along lines decidedly different from those heretofore discussed, radically reorganizing the administration without materially increasing the power of the governor, establishing what is properly denominated "commission government." New Jersey has gone further than any other state in establishing this form of administration in providing by successive acts for four rather radical changes in its administrative system. In the first place, a departmentalization program was consummated by consolidating numerous agencies into departments. Secondly, these departments were made substantially independent of the governor. They are for the most part directed by boards which are bipartisan in some instances and serve for overlapping terms, usually longer than that of the governor. While the governor appoints with the advice and consent of the senate most of the heads of departments, he enjoys only a very limited power of removal and, therefore, cannot control his administration. Thirdly, most of the financial control was placed in the state house commission composed of the governor and two officials chosen by the legislature. This commission is empowered to permit transfers of items within appropriations granted to a department and has charge of emergency funds, the "state institution construction fund," and supervision of the state purchasing agent, who is appointed by the governor and senate for a five-year term (the governor serves three years) and can be removed only for cause. While the budget is framed under the governor's control, the legislature may disregard its recommendations. Fourthly, certain means were provided for securing a degree of coordination and coöperation between departments. Monthly meetings of the governor and other executive officials are required by

<sup>42</sup> For a criticism of the tendencies in reorganization programs, see F. W. Coker, "Dogmas of Administrative Reform as Exemplified in the Recent Reorganization in Ohio," 16 *Am. Pol. Sci. Rev.*, 399-411 (1922).

law. Exchange of personnel and equipment by departments in common undertakings is permitted.<sup>43</sup>

While the New Jersey reorganization system as well as the similar plans adopted in Wisconsin and Michigan achieve by various means a certain amount of departmental coördination and co-operation, they do not provide for an integrated and responsible administrative system, and, therefore, present a sharp contrast to the reform programs. They do not diminish the powers of the governor, but they fail to make him the responsible head of state administration. They do, however, introduce the short ballot and in this and other respects register an advance.<sup>44</sup>

### X. PIECEMEAL REORGANIZATION

Several states have effected only piecemeal reorganization by retaining most of their old systems and providing for central control of such activities as welfare, penal, and educational institutions. Thus, a state board of control in West Virginia manages the charitable and penal institutions.<sup>45</sup> Again, in 1919, several agencies in the Texas administration were consolidated into a board of control which exercises control over all eleemosynary institutions and also acts as a budgetary agent.<sup>46</sup> South Dakota in 1925 consolidated twenty-seven agencies into two departments.<sup>47</sup>

The above programs of reform indicate that state administration in general is being rapidly improved. Integration of administration by means of departmentalization, increase in the administrative powers of the governor, and centralized financial control is the primary object of these reforms. Since state administration is not a static affair, the future will doubtless modify the present program of reform. Experience will indicate which of the solutions of the various phases of state administration is most desirable. Changes in the emphasis on the different state activities may cause the abolition of some agencies and the creation of others. Each state government should have a permanent agency charged with the duty of constantly making a comparative study

<sup>43</sup> See A. N. Holcombe, *State Government in the United States* (Rev. Ed., 1926), 307-310. Also, W. F. Dodd, *State Government* (2nd Ed., 1928), 243-245.

<sup>44</sup> See Dodd, *State Government*, 245. Dodd thinks that these reorganizations have improved administration in New Jersey, Wisconsin, and Michigan.

<sup>45</sup> *Ibid.*, 247.

<sup>46</sup> Stewart, *op. cit.*, 40.

<sup>47</sup> Buck, *Administrative Consolidation in State Governments*, 33.

of state administration and of recommending for the consideration of the executive and legislature such changes in the machinery and functions of state administration as are necessary to secure and maintain its efficiency.

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## CHAPTER XXXVIII

### THE ORGANIZATION OF STATE COURTS

#### I. GENERAL SCHEME OF ORGANIZATION

1. *The Legal Basis of State Courts.* The state judiciaries rest upon both a constitutional and statutory basis. The principle of separation of powers is more fully realized in judicial matters than in legislative or executive. State courts during the eighteenth century were largely subject to legislative influences. To give them the independence that seemed desirable, it was deemed necessary to fix their organization in the state constitutions. Distrust of legislatures was probably the chief cause of this change. In some respects the change has justified itself, but in others it has been a serious handicap. It has prevented the ready readjustment of the courts to the changing needs of society since such modification involved a constitutional amendment. The courts themselves have been unable to make certain changes in the light of their experience. It has narrowed the scope of the influence of the courts by making it impossible for the executive and legislative agents to use them in advisory matters. For the most part the complete hierarchy of state courts is found set out in the state constitutions, including in some instances jurisdiction, procedure, and all matters relating to judicial officials; though in some instances a larger degree of statutory regulation is permitted. Only very recently have the courts in a few states been given a limited control over procedural matters.

2. *Their Organization and Jurisdiction.* In a general way, state courts may on a basis of jurisdiction be grouped into three classes: (1) lower courts of limited and special jurisdiction; (2) intermediate trial courts of general jurisdiction; and (3) courts exercising exclusively or mainly appellate jurisdiction.

In the first class may be listed (a) small claims and conciliatory courts, (b) state courts of claims, (c) probate, (d) criminal, (e) domestic relations, (f) municipal, and (g) justice of the peace courts. The small claims and conciliation courts are recent ex-



periments in this country in an attempt to cheapen justice. They are found in only a few states and are used for the settlement of disputes involving small amounts which, if collected by regular judicial process, would frequently not pay the expense involved. Procedure in these courts is simple, fees are small, and lawyers are not needed. The small claims court is usually in the larger cities a division of the municipal courts, but in most instances is independent. The complaining party goes before the judge of this court, fills out a blank, deposits a small fee, and requests the judge to summon the other party to appear on a fixed day. When the parties appear and state the facts, the judge decides the case immediately. The procedure in the conciliation courts is a little different. These courts are under the direction of a conciliator, who may or may not be a judge. The complaining party states his grievance before the conciliator who requests the other party to appear and state his contention. The conciliator then attempts to induce the parties to reach an agreement by compromise. Unlike the judge in the court of claims, he does not decide the case. If, however, he is able to persuade the parties into an agreement, as is frequently the case, it is certified and filed by him and has the effect of a judicial decision.<sup>1</sup> If the parties do not agree, they are free to resort to regular judicial process.

The state courts of claims are institutions modeled after the Court of Claims of the United States and established by the legislatures for the judicial settlement of claims against the states. Parties are authorized to bring their claims before these courts for investigation and decision. Their decisions, if against the state, cannot be enforced since the legislature of a state cannot be coerced into making the necessary appropriation to satisfy a judgment against it. Other methods used by the states for the settlement of claims are (1) one of their regular courts, (2) a board or commission, or (3) direct presentation of the claim to the legislatures. Since a state cannot be sued by one of its citizens in a federal court nor in one of its own courts without its consent, and since a judgment against the state depends for its enforcement upon the favorable action of the legislature, the decision of a court or commission on claims against a state has the effect of only a recommendation.

<sup>1</sup> See Reginald H. Smith, "Report of the Committee on Small Claims and Conciliation," 8 *Journal of Am. Jud. Soc.*, No. 1 (June, 1924), and "Justice and the Poor," *Bulletin of the Carnegie Foundation for the Advancement of Teaching*, No. XIII (1919).

In a number of states where the probate work is not done by the county judges, separate probate courts are established to probate wills, to appoint guardians for orphans or insane persons, to administer the estates of persons having died without wills, and to exercise supervision over the management of trust funds. These matters are highly technical in character and frequently involve large sums of money. The probate judge, however, is not generally an expert in the law.

In many states, separate criminal courts, courts of domestic relations, and juvenile courts have been established, though in some instances they are divisions of the municipal courts. It would seem that the latter arrangement is preferable as a means of avoiding unnecessary duplication of judicial machinery and expense without sacrificing specialization and efficiency.

Municipal courts exist in practically all cities and in many of the larger cities, such as Detroit, Chicago, and Cleveland, sit in divisions for the handling of special types of cases, and exercise a somewhat broader jurisdiction than the justice of the peace courts which they have displaced. While their civil and criminal jurisdiction is more limited than that of the trial courts, it frequently involves considerable sums of money and serious criminal matters. In the main, their jurisdiction is restricted to cases involving the violation of city ordinances. Their judges are either appointed by the mayor or elected by the people. In the larger cities and metropolitan areas the tendency is toward greater specialization in municipal courts by means of divisions for the trial of specific types of offenses.

The justice of the peace courts, despite the fact that they have been superseded in many instances by some form of a municipal court, remain the real foundation of the state judiciaries. Except in a few states where they are appointed by the governors, the justices are elected by the voters in towns, townships, or magisterial districts.<sup>2</sup> As a rule they are not trained in the law and are compensated by fees; though a recent tendency adopted by a few states is to pay them salaries. This practice should be the rule and better qualifications should be required.<sup>3</sup>

The justice of the peace exercises both judicial and administrative functions. The jurisdiction of the justices' courts is generally fixed by statutory law and restricted in civil matters to cases in-

<sup>2</sup> Chester H. Smith, "The Justice of the Peace System in the United States," 15 *Cal. L. Rev.*, 121, note 1 (1927).

<sup>3</sup> *Tumey v. Ohio* (1927), 273 U. S. 510.

volving only small amounts of money or property, ranging from fifty to one thousand dollars, and in criminal matters to only cases involving misdemeanors punishable by small fines and short terms of imprisonment. The justice also acts as a committing magistrate or police judge in giving preliminary hearings to persons accused of serious crimes. In such cases he does not determine the innocence or guilt of the accused but the probable cause of his being guilty of the offense committed. If the evidence convinces the justice that he is likely guilty, it is his duty to hold him "for court" by bond or in jail. Generally, the jurisdiction of the justices' court is concurrent with that of other courts, and since its final jurisdiction is very limited, appeals from its decisions in many instances may be taken to higher courts. While in some states its jurisdiction is restricted to a town, township, or district, in general it is coextensive with the county; especially is this the case when the justice is acting as a committing magistrate in the preliminary hearing of serious criminal complaints. The justices' courts are not courts of record; that is, they have no clerks who keep a record of their proceedings; and except when demanded, they make no use of the jury. As administrative agents of local government, the justices solemnize marriages and attest documents.<sup>4</sup>

It is undoubtedly true that the justice of the peace court is the "weakest link in the chain" of state courts. This evaluation is based upon the justice's lack of knowledge of either law or procedure, and the frequency of appeals from his decisions. In those states where legal qualifications are required, their enforcement is left to the election process, the presumption being that any one who is elected is qualified. The office of justice of the peace pays very little and generally involves many very unpleasant duties. The settlement of petty differences among neighbors is not an inviting task. In fact, modern conditions, such as improved highways, rapid transportation, efficient means of communication, and a demand for a higher order of justice make it unnecessary any longer to maintain the justice of the peace court even in rural communities. While reducing the number of the justices, placing the remainder on salary, and raising the qualifications for the office of justice of the peace should improve these courts, it is believed, as is later developed, that the proper solution of this problem is the establishment of a properly organized county court, with divisions for different types of causes, such as probate, small

<sup>4</sup> See Clarence N. Callender, *American Courts* (1927), 49-62.

claims, and petty criminal matters. Local justice must be unified to be administered with the proper emphasis and efficiency.<sup>5</sup>

The intermediate trial courts constitute the rank of courts next above the justices' and municipal courts and are variously called county, district, circuit, superior, or common pleas courts.<sup>6</sup> The county is the basic unit of the judicial organization of the states. The counties either have their separate county courts<sup>7</sup> or they are grouped into districts or circuits whose judges hold court at fixed times and places in the various counties composing their jurisdictions. If a county or a district is large and populous, there may be more than one judge for its court, or there may be two courts—one for civil and the other for criminal cases—each with a separate judge. In a few states separate courts of equity or chancery are maintained. The above titles of courts are not used with perfect consistency throughout the states. Not infrequently district and circuit, or district and superior, or county and district, or superior or common pleas may be used in the same state. No complete classification of these courts either by title or according to jurisdiction can be made because there is duplication even in jurisdiction.

These intermediate trial courts exercise both appellate and original jurisdiction in both civil and criminal matters. Their appellate jurisdiction embraces cases previously tried in the justices' and municipal courts in which their jurisdiction is not final. These cases are tried *de novo*. Their original jurisdiction is very extensive. Excepting the jurisdiction of the lower courts previously noticed all civil and criminal cases are tried in these courts in the first instance. They constitute the judicial forums of the states. The district court has been called the greatest institution of civilization, since in one generation all the property of a community is likely to pass through its hands.

These courts use the petit jury to pass on the facts in the case except in equity jurisdictions in which the judge generally passes on both the law and the facts, though in a few states no distinction between law and equity procedure is made. They also use the grand jury in criminal matters to present indictments.

<sup>5</sup> A. B. Butts, "The Justice of the Peace—Recent Tendencies," 22 *Am. Pol. Sci. Rev.*, 946-953 (1928).

<sup>6</sup> Callender, *op. cit.*, 237-276. One may find here a list of the courts of all the states with brief discussions of their jurisdictions.

<sup>7</sup> These courts should not be confused with the so-called county courts, which exist in some states, exercising a very limited civil and criminal jurisdiction.



They are courts of record having a clerk and a seal, and their judges are either appointed by the governor or elected from the county or district, for short terms of office, varying ordinarily from four to six years.

The appellate courts of the states are generally divided into (1) intermediate courts of appeals and (2) courts of last resort. The intermediate appellate courts are not found in all the states. In general three main factors have led to their establishment: (1) to afford relief to the courts of last resort through their final jurisdiction, (2) to furnish a further guarantee to justice by giving an additional opportunity for appeal, and (3) to bring appellate justice close to the litigant by means of district or circuit courts of appeal. The theory underlying their establishment is that a higher order of justice can be secured through repeated retrials and that it should be made available to every litigant with the greatest convenience and at the least expense.

These courts have been established in some states by constitutional provisions and in others by statutory law. In some states there is only one of these courts exercising both civil and criminal jurisdiction as in Alabama, Georgia, and Tennessee, and in others there are several exercising both civil and criminal jurisdiction as in Louisiana, Missouri, and Ohio, or only civil jurisdiction as in Texas.<sup>8</sup>

There is the greatest of diversity among these courts both as to title and as to jurisdiction. They are variously called Courts of Appeal, District Courts of Appeal, Courts of Civil Appeals, and, in states where there is only one, it is called the Criminal Court of Appeals in Oklahoma, the Supreme Court in New Jersey, and the Superior Court in Pennsylvania. Their jurisdiction, whether civil and criminal or exclusively criminal or civil, is generally limited to special types of suits, leaving other cases to the appellate jurisdiction of the supreme courts. Their final jurisdiction is generally sufficiently broad to end a large amount of litigation and thus furnish the relief to the higher courts that was in mind in their establishment. Appeals from their decisions are generally allowed in cases involving the interpretation of state and federal constitutions.

They are courts of record and usually have from three to nine justices. They use no juries, cases being argued on the basis of records transmitted from the lower courts. They render written opinions which are printed and issued in volume form.

<sup>8</sup> Callender, *op. cit.*, 27.

The highest courts of appeals in the states are usually known as supreme courts.<sup>9</sup> In Texas and Oklahoma, however, there are in fact two supreme courts: one for civil jurisdiction called the Supreme Court and the other for criminal jurisdiction styled the Court of Criminal Appeals in Texas and Oklahoma.<sup>10</sup> These latter courts are not intermediate appellate courts as indicated by some authors but courts of last resort.<sup>11</sup> The supreme courts regardless of title perform similar functions throughout the states.

They are established by the state constitutions except in New Hampshire and in general their jurisdiction is a constitutional matter, though in most instances its details are left to legislative discretion. Generally, their jurisdiction, whether both civil and criminal or only civil or criminal, is exclusively appellate except for the power to issue the usual writs to enforce their decisions and supervisory powers over the inferior courts.<sup>12</sup> They, however, usually have, though they do not frequently exercise it, original jurisdiction in quo warranto, habeas corpus, and mandamus proceedings, and, in a few instances, over cases involving state revenue or claims against the state. In six states, they render advisory opinions upon important questions of law at the request of the governor and, in some instances, at the request of either house of the legislature. Their jurisdiction is final in all cases except those involving a federal question.

Their jurisdiction is state-wide and includes cases appealed from trial courts and the intermediate appellate courts if they exist. In some states appeals may be taken to the supreme courts from only the lower appellate courts. These appeals are generally limited to civil cases involving certain stipulated sums of money or property and to serious criminal cases. This matter varies from state to state and is determined by the final jurisdiction of the trial and inferior appellate courts. Some states are more liberal with the right of appeal than others. Appeal is sometimes a matter of right and in other instances a matter of law. If it is a matter of law, it is considerably restricted. In either

<sup>9</sup> In Massachusetts and Maine the supreme court is called the Supreme Judicial Court; in Connecticut, the Supreme Court of Errors; in Virginia and West Virginia, the Supreme Court of Appeals; in New York, Maryland, and Kentucky, the Court of Appeals; and in New Jersey, the Court of Errors and Appeals. See *Ibid.*, 24.

<sup>10</sup> C. Perry Patterson, "The Courts of the Southwest," *The Southwestern Political Science Quarterly*, III, 2 (1922).

<sup>11</sup> See Callender, *op. cit.*, 27.

<sup>12</sup> These writs are the writs of error, certiorari, supersedeas, prohibition, quo warranto, and habeas corpus.

instance the character of the decisions of the lower courts will largely determine the number of appeals.

The supreme courts generally have considerable control over their methods of procedure; a recent tendency is to give them the rule-making power. Their terms and sessions, subject to the demands of public business, are matters of law and as a rule they sit at the capitals of the states. Their justices vary in number from three to nine, and are usually elected by a state-wide constituency for entirely too short terms. Their decisions are printed in volumes known as the "State Supreme Court Reports" and constitute the most reliable source for information concerning the laws of the states.

## II. THE STATE JUDGES

The organization of a state judiciary is after all a piece of mechanism operated by its judges upon whom its efficiency almost entirely depends. The personnel problem for our state courts is undoubtedly the chief factor in their efficiency and includes such matters as the selection, tenure, removal, compensation, and retirement of judges.

1. *The selection of judges* is possibly the most serious phase of the personnel problem. If there is not a proper method for securing capable judges, tenure and compensation are not of major importance. When the first state governments were established, their constitutions generally provided for the selection of state judges by the legislatures.<sup>13</sup> The popular election of governors and legislatures seemed, according to frontier logic, to point toward the same method for the selection of judges. Democratizing influences and distrust of governors and legislatures have almost completely established the popular election of state judges. In thirty-eight states the judges of the highest courts are elected by the people and in four by the legislature, and in six they are appointed by the governor subject to the approval of the legislature in Connecticut, the Governor's Council in Maine, Massachusetts, and New Hampshire, and the Senate in Delaware and New Jersey. The trial judges are selected in the same manner in these three groups of states except in Florida where they are appointed by the governor, though the Supreme Court justices are elected.<sup>14</sup>

<sup>13</sup> Walter F. Dodd, *State Government* (2nd Ed., 1928), 312.

<sup>14</sup> James Parker Hall, "The Selection, Tenure, and Retirement of Judges," *Bulletin X, Am. Judicature Society*, 6-7 (1927).

It is the general opinion of students of our jurisprudence that the selection of judges by either the electorate or the legislature is very objectionable. The objections to the first are obvious. In the first place, the qualities of a good judge, personal integrity, a judicial temperament, and adequate legal training cannot be properly judged by the electorate because of the lack of the proper contact or knowledge. In the second place, judges are not, or at least should not be, political officials. They are not policy-forming agents except in rare instances, in which cases, if their decisions are contrary to social movements, their effect is temporary and comparatively harmless as contrasted with the decisions of a politician judge, playing to the galleries in spectacular litigation and pledging himself in advance in campaigns to decide certain cases in favor of a certain policy. In the third place, a qualified lawyer with judicial temperament will as a rule refuse to subject himself to the expense, the uncertainty, and the distastefulness of the political game to obtain a judgeship. Furthermore, it is generally admitted that the dignity and independence of the state bench, almost indispensable qualities of a respected and efficient court, have been destroyed by popular election. The primary system of nomination has undoubtedly aggravated this situation. Statistics seem to indicate that in only three of the thirty-eight states which select judges by popular election are the results considered satisfactory.<sup>15</sup>

Selection by the legislature, though not ideal, is far preferable to popular election. The legislatures contain a good deal of legal talent, and, in general, are more capable of selecting suitable judges than the voters. In the four states using this method, with the possible exception of Rhode Island, legal ability, character, and success at the bar have been generally made the chief considerations by the legislature in choosing the judges. However, if all the judges of a large state were elected by this method with short terms, a large amount of the time of the legislature would be consumed in the process. The chief weakness of this method is the temptation which it offers to the legislature to select the judges from its own members. The general run of legislatures is not burdened with a surplus of material of a judicial caliber. Moreover, able judges are not a matter of majorities, or pluralities, or jockeying.

The appointive method is undoubtedly preferable to election by either the people or legislature. The experience of the states which

<sup>15</sup> *Ibid.*, 8-12.



are using it corroborates this statement. Moreover, it is the method followed by the national governments of the world with satisfactory results. Furthermore, it is the consensus of the students of our judiciaries, that, in those states that once practiced it, the bench has suffered by its abolition. The chief advantages of the appointive method are two: first, a chief executive is in a better position to ascertain the special fitness of candidates for judgeships than either the electorate or the legislature, and, secondly, it fixes the responsibility for the appointment upon a conspicuous official. Public opinion can more nearly control a governor than it can the electoral process or the irresponsible members of a legislature. "Of all the methods of selecting judges of which we have actually had considerable experience in this country," said Dean Hall, of the University of Chicago Law School, "that of appointment by the executive has unquestionably produced the ablest and most satisfactory courts."<sup>16</sup> Probably inertia and prejudice are the chief reasons for the limited use of this method.<sup>17</sup>

2. *The tenure of judges* is an important consideration in judicial organization. Regardless of the grade of material selected, it constantly improves with experience. The terms of judges of the higher courts are generally longer than those for the judges in the lower courts and vary from two years in Vermont to life terms in Massachusetts, Rhode Island, and New Hampshire.<sup>18</sup> The terms of the judges in the trial courts range from four to six years. It is a matter of statistics that in those states with longest tenure or with a tradition of reappointment, amounting to the same, the judges have been of the highest caliber.<sup>19</sup> While it is true that by reappointments the benefits of a life tenure may be secured, it would seem the part of wisdom not to trust such a matter to politics. In the reorganization of courts, the tendency is toward longer terms, which, undoubtedly, means better judges.

3. *The removal of judges* is closely associated with tenure because longer terms for judges make more necessary an adequate method for removing the incompetent. No system of selection will work perfectly. Moreover, an effective system of removal might possibly deter some undesirable aspirants from attempting

<sup>16</sup> *Ibid.*, 15.

<sup>17</sup> See Albert M. Kales, "Methods of Selecting and Retiring Judges," 11 *Am. Jud. Journal*, No. 5, 138-144 (1928).

<sup>18</sup> The term is six years in 18 states, from ten to twenty-one in 13 states, nine in 1, eight in 10, seven in 2, two in 1, and for life in 3). See John Mabry Mathews, *American State Government* (1927), 436-438.

<sup>19</sup> Hall, *op. cit.*, 20.

to get on the bench. Judges may be removed in all the states by impeachment, in seven by the recall, in about one-fourth by concurrent resolution of the legislature, and in several by the governor upon address by both houses of the legislature.<sup>20</sup> Impeachment is no longer regarded as an effective remedy. Removal by recall has its defenders and critics, and, is, of course, as defensible as popular election. It originates in the usual way by a petition of a certain percentage of the voters, varying from ten to twenty-five per cent. The judge is generally allowed to serve a period of six months before removal proceedings may be instituted. The merits of this method rest upon the ability of the electorate. In final analysis it must be regarded as one of the exaggerations and illusions of democratic theory. Removal by the governor upon an address by both houses of the legislature is more simple, less expensive, and sufficiently cautious to constitute an effective and properly critical method of removal. It meets all demands. If the work of the courts is regarded as somewhat political in character, it may be replied that the governor and legislature are political agents, and are, therefore, a proper means for checking any judicial policies which may be contrary to public interest. It is their acts with which the courts are primarily concerned. This method fixes responsibility upon the governor for final action who represents a state-wide constituency. He has the benefit of the opinion of the members of the legislature, who represent localities. This method places removal in capable hands, fixes responsibility, and provides repeated hearings and checks on precipitate action, without the exclusion of the influence of public opinion.

4. *Compensation* is one of the major factors involved in the improvement of the bench. It can scarcely be expected that judge-ships will ever pay sufficiently to attract the most able lawyers. But society is cheating itself when it is content with a mediocre bench. Life and property are matters of too vital importance to be entrusted to the care of an incompetent judiciary. Fortunately, many able lawyers because of either their financial independence or their love of the work have served as state judges at personal sacrifice. Unfortunately this element of altruistic lawyers has not been sufficiently numerous to elevate the state judiciaries to the place of dignity and respect occupied by the Federal Courts.

In some of the states, the salaries of judges are fixed in their constitutions; in a half-dozen others, there is a constitutional

<sup>20</sup> Frank G. Bates and Oliver P. Field, *State Government* (1928), 382.

minimum, and in several states, the constitutions forbid the decreasing, and, in some instances, the increasing of the salaries of judges during their terms of office. In thirty states, the legislatures have complete control of the salaries of judges. The salaries of the supreme court justices vary from \$4,800 in South Dakota to \$25,000 in New York, the average being \$8,980.56.<sup>21</sup> Since 1919, thirty-nine states have increased the salaries of supreme court judges and six of these, Florida, Indiana, Maryland, Massachusetts, South Carolina, and Virginia, have twice increased judicial salaries during this period.<sup>22</sup> The chief justice frequently receives from \$500 to \$1,000 more than his associates. The trial judges have generally been included in the above increases, but they always receive from one to several thousand less than the judges of the higher courts.

From December 1, 1920, to July 1, 1927, the average salary of the judges of the state supreme courts have increased from \$7,185.00 to \$8,980.56. This is an increase of practically \$1,800 a year for each judge or about \$5.00 a day. While this is not a poor showing, it must be realized that only eighteen states have joined the movement. Since, however, the question of salaries for judges is not a partisan or controversial matter, it is reasonable to expect a more rapid solution of this problem, as well as a more widespread one.

5. *Retirement of state judges* is a matter in which very little progress has been made. Some state constitutions provide for the automatic retirement of judges at a certain age, which, in five states, is fixed at seventy years. This is a delicate matter because the physical and mental vigor of judges varies considerably. Frequently judges in their closing years become so conservative that they are barriers to a progressive jurisprudence and should be retired. Possibly some provision for continuance in office should be made to cover exceptional cases. The movement for pensioning judges on retirement has made little headway, though in a few states some progress has been made. Incidentally, a pension system based upon an age limit, length of service on the bench, and a fixed percentage of salaries would be a strong factor in inducing capable material to make the sacrifice involved in a life's service on the bench. It would be a strong factor in professionalizing the bench.

<sup>21</sup> *Senate Document*, No. 81, 70th Cong., 1st Sess., 4-5.

<sup>22</sup> Fourteen states now pay supreme court judges \$10,000 or more. See *Senate Document*, No. 188, 70th Cong., 2d Sess., 3-4.

## III. JUDICIAL REORGANIZATION IN THE STATES

Among the several causes of the inefficiency of our state courts is always listed that of defective organization. The original organization of state courts, from which there has been no radical departure, was determined, according to an eminent authority, by the following circumstances: (1) "The organization of the English Courts at the Revolution; (2) the need of a rapid making over of English common law and legislation into a common law for America in a period when little could be achieved in such a field by legislation, and hence courts alone could be looked to; and (3) the demand for decentralizing the administration of justice and bringing justice to everyman's door in the rural American community in the first half of the last century."<sup>23</sup> The result was a multiplicity of courts, with hard and fixed personnels, with separate and overlapping jurisdictions, and with the chief object in view to develop the law by judicial decisions rather than to administer justice with some degree of specialization. The primary needs of society for an increased judicial service have generally been met by the establishment of more courts. By this process the state courts have become so numerous and unrelated as to constitute a very serious problem of readjustment.

The condition of our courts is fully realized by the well-informed members of both the bench and the bar as well as by many educated laymen and for several years a movement for their reform, supported by state bar associations, the American Bar Association, various civic organizations, judges, governors, and publicists, has constantly been gaining headway. Other phases of this movement are discussed in connection with the work of the courts, but in so far as it relates to organization, two matters are involved: (1) the unification of the courts into a properly articulated system of courts, and (2) the establishment of machinery for their efficient administration.<sup>24</sup>

A special committee of the American Bar Association in 1909 proposed a scheme of reorganization for state courts, embodying in substance the following features: first, that the whole judicial power of each state be vested in one great court; secondly, that this court consist of three branches: (1) county courts (including municipal courts), having exclusive jurisdiction of all petty causes,

<sup>23</sup> Roscoe Pound, "Organization of Courts," 11 *Jour. of Am. Jud. Soc.*, No. 3, 73 (1927).

<sup>24</sup> American Bar Association *Reports*, XXXIV, 589 (1909).



maintaining numerous local offices for the filing of papers, and sitting at as many places in the county as the business requires; (2) a superior court of first instance, exercising original, exclusive, and general jurisdiction at law, in equity, probate, and administration, guardianship, and divorce, maintaining local offices for the filing of papers and one regular place for trial in each county, and consisting of the three divisions of (a) law, (b) equity, and (c) probate; (3) a final court of appeals with such branches as are necessary for the transaction of its business either at the capital of the state or at designated cities in the state; and third, that all judges be members of the whole court and subject to assignment to any of its branches or their divisions or localities where they may sit.<sup>25</sup>

The advantages of such a scheme of reorganization are: (1) it creates from separate and largely independent courts a unified judicial department; (2) it eliminates by means of transfer of judges the waste of judicial power now resulting from courts with fixed personnel; (3) it makes possible the ready transfer of cases to the proper branch or division, if errors have been made in filing them; (4) it also eliminates the cost involved in transfer of records from court to court; (5) it simplifies appellate jurisdiction since an appeal would merely be a motion for a new trial before another branch of the same court; (6) it eliminates conflicts between judges of coördinate jurisdiction, which are too frequent in the present decentralized system; (7) it makes possible a specialization of the part of judges in particular classes of litigation since a judge could be assigned to the branch or division in whose work he had proved most capable; (8) it makes less necessary boards and commissions with judicial functions, since a better organization of the judicial force makes it capable of doing a large volume of work; (9) it centralizes judicial responsibility and thus makes possible an effective administration of the judicial machinery of the state; (10) it places more emphasis on the work of the lower courts where the great mass of litigation is adjudicated. It eliminates the justices of the peace by making their work a part of that of an efficient county court. Local justice is centralized in this court in which any amount of specialization in the different types of local causes may be provided. The present organization of state courts is particularly faulty in its lack of provision for the efficient handling of small claims and petty causes. Capable judges are found largely in our higher courts.

<sup>25</sup> *Ibid.*, 593-595.

The small litigant when his life or property is involved is entitled to the protection of the state through an efficient judiciary.

It is not urged that this proposal should be rigidly followed by all states, but that in its broad outlines it offers constructive suggestions susceptible of adaptation to the conditions, experience, and types of litigation in any state. Constitutional amendment would generally be involved in its realization. It may at times be wiser to secure by legislation as much of the scheme as possible than to fail by constitutional amendment to make any progress in the matter. While in a few states such as Michigan, Missouri, and Oregon there are constitutional provisions implying judicial unification, in fact it does not exist, and little has been accomplished in this direction except in a few of the larger municipalities such as Cleveland, Chicago, and Detroit.

An administrative organization for the judiciary is essential to its most effective operation. It still remains in the states the headless division of their governments. Any institution however perfectly organized should have a directing head. The administrative organization should consist of (1) a chief administrator, (2) a business director, and (3) a judicial council. The chief justice of the state should be made the administrative head of the judiciary and be held responsible for its efficient operation. He should have the power to assign judges to any particular branch or division of the judiciary and transfer cases in a similar manner to the end that the full energies of the judiciary be exerted on the business at hand. There should be associated with the chief justice acting for the judiciary as a whole the senior justices of its branches and divisions to aid him in the performance of his administrative duties. Likewise, the entire clerical and stenographic forces of the judiciary should be under the supervision of a responsible officer with subordinate offices in each branch and division to look after the filing and preservation of their records and the collection of court fees. They should be paid salaries and take the place of the present system of clerks, who are frequently more interested in fees than in justice and are generally independent of effective judicial control and of one another. There is now practically no supervision of this business, which amounts annually to large sums of money and is characterized by much duplication and recopying of records needlessly prolix and expensive.

A judicial council associated with the chief justice for advice and assistance in the direction and further improvement of the

judiciary is now generally recognized as desirable.<sup>26</sup> Since 1922 councils have been established by statute in North Carolina, North Dakota, Ohio, Oregon, Rhode Island, Washington, Virginia, and Kentucky, and by constitutional amendment in California.<sup>27</sup>

The membership of the councils in the states varies from five members in Oregon to eleven in California; nine, however, is the usual number.<sup>28</sup> It may be general in character, composed of all the judges of the state or representative of either judges or both judges and lawyers. In all but two states, Oregon and California, practicing attorneys not holding judicial office are members of the councils, and in Connecticut and Rhode Island a prosecuting attorney is a member. Kansas and Washington add the chairmen of the judicial committees of the legislatures. The judges in the councils generally represent both the trial and appellate courts. The judicial members of the council are almost invariably appointed by the chief justice, though they may be designated by the governor. The chief justice is usually ex-officio chairman of the council, though it may select its own chairman as in Massachusetts and Kansas. For the council to be in the best position to make a survey of all problems of judicial organization and administration, its membership should be representative of the bar, whose members are really public officers and whose opinion and influence are important factors in effecting changes in our legal institutions.<sup>29</sup>

The powers of the councils are generally fact-finding and advisory in character and have been admirably summarized as follows: (1) to conduct a continuous survey of the volume and condition of business in the various courts, the work accomplished, and the character of the results; (2) to devise ways of simplifying judicial procedure and improving the administration of justice; (3) to acquaint all courts with the results of various experiments in other jurisdictions, and to foster the adoption of such changes as seem in the interest of uniformity and the expedition of business; (4) to bring to the attention of the political departments of the government all problems which cannot be solved except by

<sup>26</sup> Charles H. Paul, "The Judicial Council Movement," 10 *Journal of Am. Jud. Soc.*, No. 3, 78-86 (1927). See James W. McClendon, "Advisory Civil Judicial Council for Texas," 6 *Tex. L. Rev.*, No. 1, 59-72 (1927).

<sup>27</sup> J. A. C. Grant, "The Judicial Council Movement," 22 *Am. Pol. Sci. Rev.*, 936-944 (1928).

<sup>28</sup> The Federal Judicial Council established in 1922 consists of ten members, the Chief Justice, and nine Senior Circuit Judges.

<sup>29</sup> Clarence N. Goodwin, "The Public Function of the Bar," 5 *Journal of Am. Jud. Soc.*, No. 6, 181-186 (1921).

amendment of the laws or constitution; and (5) to conduct such special investigations as the legislature or governor may desire, and to act as an advisory body in such bills as shall be submitted for the council's consideration.<sup>30</sup> The California Council and a few judicial conferences, not generally classed as councils, have control over the assignment of judges, and in the case of California, the rule-making power.<sup>31</sup>

The councils that have been established have proceeded rather cautiously as might have been expected. They have gathered statistics along several lines, have sent representatives to various states and foreign countries to investigate certain matters of judicial organization and procedure, and have made recommendations to legislatures for court legislation. The councils of California and Massachusetts have been the most active, but in several states the legislatures and governors have asked the council to make special investigations as a basis for future legislation. Several important statutes relating to judicial matters have been completely drafted by the councils. As advisory legislative bodies on judicial problems they will undoubtedly prove very helpful and in general they have already achieved such results as fully justify the experiment.<sup>32</sup>

<sup>30</sup> Grant, *op. cit.*, 941.

<sup>31</sup> Judicial conferences are provided in Wisconsin, New Jersey, Colorado, and Texas, varying in composition and powers. See, "Texas Unifies Trial Courts," 11 *Journal of Am. Jud. Soc.*, No. 2, 38-39.

<sup>32</sup> Robert G. Dodge, "A Judicial Council in Operation," 10 *Journal of Am. Jud. Soc.*, No. 3, 86-91 (1927).





## CHAPTER XXXIX

### THE WORK OF THE STATE COURTS

#### I. THE FUNCTIONS OF STATE COURTS

The work of the judicial departments of our state governments is not generally valued as highly as that of either the executive or legislative departments. This appraisal is not based upon the relative efficiency of these departments as much as upon certain more or less inherent conditions which are included in the operation of the courts. In the first place, the public is not informed about their work. It receives less publicity than that awarded the acts of the other departments. In the second place, the courts necessarily receive considerable criticism because their work is highly controversial in character. They cannot satisfy both parties to a dispute; they must deny the contention of one. The courts administer law and justice, if possible. They cannot decide cases according to their discretion. In the third place, the scope of their work is primarily restricted to litigated disputes in which the masses are not directly interested. Litigation is largely regarded as a sort of pastime exercise for those who are financially able to play the game, a kind of gamble, and certainly an uninteresting matter by the ordinary citizen who for various reasons chooses to live in peace with his neighbors. Furthermore, the technical character of their work prevents its being understood and appreciated by the average man. Moreover, there is a rather deep-seated feeling of distrust of the courts. The common man feels that he is at a distinct disadvantage in court. He is afraid to trust it with his interests and generally prefers a compromise to judicial settlement.

The work of the courts, however, is becoming increasingly important. The technical character of modern society has tremendously increased the volume of litigation. Modern traffic is an illustration. The growth of business is an important contributor to the work of the courts. The tendency to correct all the social and moral ills of society by legislation in the end involves the

courts. The matter of whether man evolved from lower forms of life is now a judicial problem in some of the states. The average American is not particularly anxious to trust his own welfare to the courts, but he is quite willing to use them in helping him lift his neighbor to his own high level.

The work of the state courts, roughly speaking, may be divided into three categories: (1) judicial, (2) administrative, and (3) advisory. The courts in the United States, both Federal and State, have generally held that the judicial function restricts their activities to the decision of only litigated disputes. They do not exist, they hold, to decide abstract questions of law unless the rights of actual litigants are involved. They, therefore, consider only cases or controversies brought before them by litigants. In fact, according to this generally accepted view of the judicial function, it is considered a contempt of court to initiate and prosecute a fictitious controversy in which there is no actual conflict of interests between the plaintiff and defendant. The work of the state courts involves the settlement of three types of disputes: (1) those between private individuals, (2) those between private individuals and the government, and (3) those between the departments of the government. In the settlement of the first type of disputes, the courts perform an important function primarily in the field of private law; the second and third classes of disputes involve public law and frequently public policy, and are, as Professor Holcombe has said, "particularly interesting to students of government."<sup>1</sup> In the adjudication of these disputes they are forced to interpret the state constitutions. While in all cases the courts must disclose what the law is, the situation is essentially different when the conflict is between a statute and the constitution of the state. The power of the state courts over these conflicts is not only implied in the nature of the system of government in the states, but is expressly conferred by the Constitution of the United States.<sup>2</sup> The implied power gives the state courts the right to negative the acts of the state legislatures in conflict with the state constitutions, but the express power extends this right to any clause of a state constitution in conflict with the Constitution, Laws, or Treaties of the United States. In the first class of conflicts, the decision of the state supreme court is final; in the second, its decisions are subject to the review of the Supreme

<sup>1</sup> *State Government in the United States* (Rev. Ed., 1926), 430.

<sup>2</sup> Art. VI, Sec. 2. See also C. G. Haines, *The American Doctrine of Judicial Supremacy* (1914), 287-311.

Court of the United States.<sup>3</sup> The scope of the judicial veto, of course, increases with the volume of legislation and the consequent increase of litigation. Frequently in the exercise of this power, the courts are forced to negative a policy of the legislature and may be said to determine the policy of the state in the matter involved. In the exercise of this function, the decisions of state courts may directly affect the entire body of the state's citizens or its institutions. Furthermore, the doctrine of judicial review extends to the acts of public service commissions and administrative officers. This power is generally exercised on the basis of the law of reason and due process. Faulty procedure or the exercise of an excess of power by the administrative agent are the most common matters to which it is applied. Its purpose is primarily to protect personal and property rights against the illegal or improper acts of administrative officials.<sup>4</sup> Police regulation and the control of business affected with a public interest are the main branches of administration in which judicial review of administrative determinations seems most desirable.<sup>5</sup>

The administrative functions of state courts may or may not involve the hearing and decision of cases. The state court of claims is essentially an administrative agent, and might as well be called a board or a commission. It is essentially a fact-finding body without the power to enforce its decision. Courts of equity or courts exercising equity jurisdiction frequently issue injunctions to prevent the violation of some law or right. The courts administer property through receivers, trustees, and administrators. In some states they are the fiscal and administrative agents of the county and have control of the election machinery.<sup>6</sup>

In a number of the states, the state constitutions make the state supreme courts advisory agents to the governor, and to either or both houses of the state legislature.<sup>7</sup> In other states advisory opinions have been authorized by legislative acts and in a few states the courts have rendered advisory opinions without constitutional or statutory authorization. Most of the legislation requiring this function of the courts has been either declared un-

<sup>3</sup> Prior to 1916 there was no right of appeal in these cases unless the state court denied the rights claimed under the supreme law of the land.

<sup>4</sup> Haines, *op. cit.*, 38-61.

<sup>5</sup> John Dickinson, *Administrative Justice and the Supremacy of Law in the United States* (1927), 306.

<sup>6</sup> Leonard D. White, *Introduction to the Study of Public Administration* (1926), 34-35.

<sup>7</sup> This is a constitutional duty of the courts in Massachusetts, New Hampshire, Maine, Rhode Island, Florida, Colorado, and South Dakota.

constitutional by the courts or repealed by the legislatures,<sup>8</sup> though in 1923 the legislature of Alabama made statutory provision for advisory opinions and its action has been sustained by the supreme court of the state.<sup>9</sup>

The purpose of the advisory opinion is to assure the executive or legislative department of the constitutional character of its contemplated action. Since the validity of the acts of these departments is in final analysis determined by the state supreme courts, the advisory opinion would tend to forestall litigation by preventing unconstitutional action by these departments and by making it useless to test their approved action. Of course, such opinions need not be followed by the executive or legislative department, but refusal to do so would likely mean that their acts in such instances would be held invalid. While the history of the advisory opinion is that it has worked well and probably should be used more extensively, it is not looked upon with favor by the courts. This means that its establishment by legislative act is very likely to be judicially vetoed.

## II. THE LAW OF THE STATES

In general, the law applied by state courts is the same as that applied by the courts of the United States with the important exception of admiralty law, and includes constitutional, international, statutory, and common law, and equity, which have been treated in connection with the national judiciary. A classification more important for our purposes in connection with state courts is civil and criminal law. This classification is based upon the relative seriousness of the wrongs committed by individuals. A civil offense is a wrong against an individual which is not considered sufficiently serious by the state to warrant its intervention to remedy the wrong. It leaves this matter to the person injured, but maintains courts that he may use for this purpose if he so desires. The law applying to such wrongs is called civil law. If, however, a wrong is of sufficient seriousness as to involve the welfare of society, it is a criminal offense and the law applying is criminal law. A crime may be defined as a wrong committed against society in violation of a public law. The offender is a criminal and the state as a matter of public policy will intervene to punish him.

<sup>8</sup> See Albert R. Ellingwood, *Departmental Cooperation in State Government* (1918), 30-78.

<sup>9</sup> Manly O. Hudson, *The Permanent Court of International Justice* (1925), 144.



This policy of the state is based on the right of self-defence and is necessary to preserve society.

The civil law embraces the law of property, torts, contracts, business organization, and domestic relations. Property may be either real estate or personalty. Real estate is usually defined as land with its permanent improvements; personalty as movables. A tort is a wrong against a person, as assault and battery or false imprisonment; or against both a person and his property, as nuisance; *e.g.*, factory smoke; or against a person's property, as trespass. A tort becomes a crime when it is sufficiently serious to demand the intervention of the state in behalf of the public. A tort is redressed by an individual and a crime by the state. The most important distinction between a tort and a crime is the method of their redress, which is a matter of social policy.<sup>10</sup> Certain relationships are recognized by the law as a contract. A contract is an agreement between two or more persons to do or refrain from doing a particular thing. Such an agreement establishes what are called contractual rights which the law protects. Individuals frequently combine for business purposes in the form of either a corporation or a partnership. A corporation is a legal person and has certain rights. It may sue or be sued. A partnership differs from a corporation in that its members are liable individually for its debts, whereas the members of a corporation are responsible for only the liability attaching to the shares of its stock which they own. The law of domestic relations deals with family relations, such as marriage, divorce, and guardianships. These are only some of the more important matters to which the civil law relates and are intended to indicate in a very general way its nature. Our purposes forbid an attempt to analyze the law relating to these various subjects. It is hoped that sufficient has been said to differentiate somewhat at least the civil from the criminal law and to indicate the extent to which these relationships have come under the supervision of the state; of course, the civil law varies with the states.

Criminal law in the states is either a matter of the common law or of statutory law. There are no common law crimes against the government of the United States. Crimes are generally classified on a basis of their seriousness into three categories: (1) treason, (2) felonies, and (3) misdemeanors. Treason is the most serious crime known to criminal law and is an offense against the state. It is generally defined in the state constitutions, as in the Constitu-

<sup>10</sup> Frank G. Bates and Oliver P. Field, *State Government* (1928), 409.

tion of the United States, as consisting of waging war against the state or aiding or abetting its enemy. Frequently the conditions under which persons may be convicted of treason are stated in the state constitutions and death is the penalty. Felonies are the more serious crimes, usually punishable by a term of one or more years of imprisonment in the state penitentiary or by death, though there is not complete uniformity in the states as to what constitutes a felony. In general, they include the graver offences of (a) murder, (b) manslaughter, (c) arson, (d) burglary, (e) robbery, and (f) larceny, and in some states forgery, counterfeiting, kidnapping, and bigamy are classified as felonies;<sup>11</sup> the tendency is to increase the list of felonies.

The less serious crimes are called misdemeanors, though an offence may be a misdemeanor in one state and a felony in another. Forgery is an example. Conspiracy, assault and battery, false imprisonment, nuisance, unlawful assembly, libel, malicious trespass, and riot are generally classed as misdemeanors. No satisfactory definition of misdemeanors can be given further than that they include all crimes inferior to felony for which punishment by indictment or other prescribed proceedings is provided by law. Frequently misdemeanors are not given specific names. The punishment for misdemeanors is a fine or confinement in jail.

### III. THE JURY SYSTEM

The jury is a fundamental part of the common law system. The right of trial by jury in criminal cases is guaranteed by all the state constitutions and in civil cases by all except those of Louisiana and Utah.<sup>12</sup> There are two types of juries: (1) the grand jury, and (2) the petit jury. The grand jury is not a trial jury and is used only in the preliminary proceedings of criminal cases. It is required or permitted in all the states by either their constitutions or statutes.<sup>13</sup> At common law it consists of not less than twelve nor more than twenty-three members. While the common law

<sup>11</sup> The most of these terms are generally understood: manslaughter is the killing of a human being without forethought; arson is the malicious burning of another person's building; burglary is the breaking into the building of another to commit a felony; larceny is the unlawful taking and carrying away of the personal property of another with the intent to deprive the owner of it.

<sup>12</sup> Thomas M. Cooley, *Constitutional Limitations* (8th Ed., 1927), II, 864.

<sup>13</sup> The constitutions of Georgia, Kansas, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, Vermont, Virginia, and Wisconsin do not require it.

maximum is still observed by the states, the minimum has been considerably modified. Its size is determined by the constitutions in a number of states, and in Montana, Oregon, and Utah is fixed at seven, any five of whom may return an indictment. In several states the number is fixed at twelve with the concurrence of nine necessary for indictment.<sup>14</sup> In all the states there is some court, commission, or officer of the law whose duty it is to make a list or panel of suitable persons to be summoned for jury service. This list is called a *venire* and is delivered by the clerk of the court to the sheriff who summons those listed to appear for jury service. On the day of opening court, the names of those in the list are placed in a box, or a hat, or jury wheel, and as many are drawn as there are members in the jury, varying with the state. Those selected constitute the grand jury, or as it is sometimes called, the grand inquest. Then they elect or the court appoints one of their number foreman, and after having been sworn to investigate and present all offences that may have been committed in the county, and charged by the court on their duties, they retire to their room to prosecute their inquiries in secret.<sup>15</sup>

1. *The Grand Jury* may act upon matters presented to it by the court or the prosecuting attorney, or upon its own initiative. It has the power to summon witnesses in the interest of the public and the prosecuting attorney, whether a state, district or county attorney, may interrogate such witnesses. He may also aid the jury in proving their indictments or bills as this is generally a technical matter, but he is not to influence or direct it in its findings or be present when it is deliberating upon the evidence or voting. When a grand jury completes its investigation of a case, it votes to indict the party involved or to dismiss the case. At the close of its work it presents in open court the results of its inquiries in the form of indictments or true bills, and is dismissed.<sup>16</sup>

2. *The Petit Jury*. The petit or trial jury is a more serious part of judicial machinery, especially in criminal cases. The common law trial jury consists of twelve men in criminal cases. This is the rule in felony or capital cases, though in Florida eight, and in Utah six, constitute a jury for felony cases. Several states permit a jury of less than twelve for minor offenses. In civil cases the requisite number for the jury has been varied more radically. The

<sup>14</sup> Kentucky, Louisiana, Missouri, Oklahoma, Texas, and Wyoming are in this group.

<sup>15</sup> *Constitutional Convention Bulletins* (Illinois, 1920), No. 10, 834.

<sup>16</sup> See Everett Kimball, *State and Municipal Government in the United States* (1922), 285-287.

constitutions of seven states permit their legislatures to provide for a jury of less than twelve.<sup>17</sup> The constitution of Utah fixes the number at eight in courts of general jurisdiction. In Florida the number is fixed at six by statute. In Virginia the number is fixed by statute at seven except in the jurisdiction of the justice of the peace, where it is five. In several of the states, under certain conditions the parties to a case may waive the right of trial by jury in criminal and civil cases; and in some jurisdictions in civil cases this right is considered waived unless one of the parties demands a jury. In criminal cases as a rule this right cannot be waived in felonies.<sup>18</sup>

The number necessary to concur in a verdict in either criminal or civil cases is by no means uniform throughout the states. A unanimous verdict of a jury of twelve is required in all the states in capital cases, and also in felonies except in Louisiana.<sup>19</sup> Constitutional provisions are made for three-fourths of the jury in Texas and Oklahoma and two-thirds in Montana and Idaho to render verdicts in misdemeanors. In civil cases a less than unanimous verdict is either provided or permitted in courts of record in eighteen states.

The selection of the trial jurors is a more tedious matter than that of the grand jurors. This is due to a system of challenges whereby either party to the suit may object to the jury as a whole or to individual jurors. After the clerk of the court has selected by lot from the panel or list of jurors the number required, the court directs the sheriff to have them take their seats in the jury box. The clerk then reads their names in the hearing of the parties, and if there is no objection, they are sworn and the trial proceeds. Either party, however, may object to the jury as a whole because of some actual or alleged irregularity committed in summoning it or to individual jurors because of their disqualifications. There are two classes of challenges to individual jurors: peremptory and casual. The peremptory challenges are absolute, but their number is limited or fixed. This number varies with the states and is larger in criminal than in civil cases.<sup>20</sup> The challenges for

<sup>17</sup> This group includes Michigan, Colorado, Wyoming, South Dakota, New Jersey, Florida, and Virginia.

<sup>18</sup> The constitutions of Minnesota and Wisconsin provide that the jury may be waived in all cases in the manner prescribed by statute. Wisconsin by statute has provided that the accused may waive the jury and be tried by less than twelve men.

<sup>19</sup> *Illinois Constitutional Convention Bulletins*, 843-844.

<sup>20</sup> Three, four, five, and six are the usual numbers allowed to each party in civil cases. Callender, *op. cit.*, 95.



cause are unlimited in number, but the validity of the objections to any juror challenged for cause is determined by the court, which also passes upon the challenge to the array or jury as a whole.<sup>21</sup> All challenges are made when the jury is sworn. This process is continued until the requisite number of qualified jurors is obtained even if another venire has to be summoned.

3. *The Usual Qualifications of Jurors.* The qualifications of jurors in general are that they be citizens,<sup>22</sup> twenty-one years of age, and freeholders or householders; that they be unrelated to either party to the case, unprejudiced toward either party, and uninterested in the outcome of the trial; and that they possess a sound mind, a good hearing, and a clear vision. Their qualifications are a state matter and, of course, vary in some respects from state to state.

The functions of the trial jury are to judge of the facts in the case and to render a verdict of guilty or not guilty in criminal cases and to assess the damages, if any, in civil cases. Sometimes there is no issue of fact to be determined in which case the judge directs the verdict of the jury. In some instances specific questions are submitted to the jury instead of the entire case. The jury deliberates in secret under the chairmanship of its foreman, who reports its decision in open court. If the requisite number to concur in its verdict is not obtained, the foreman so reports. This means that the case must be retried before a new jury. In most state jurisdictions, the jury almost controls the action of the courts; the judge has been reduced to a mere referee.

4. *The Weaknesses of the Jury System and Suggested Changes.* While the jury system is undoubtedly the most unique feature of the common law system and is worthy of being maintained, it has developed certain obvious weaknesses. In several states the grand jury is not used as a method of indictment in misdemeanors, and even in felonies only upon the order of the judge of a court having power to try and determine felonies. Indictment by information furnished by the prosecuting attorney is substituted for the grand jury. Indictment by information has worked well where it has been tried and is more efficient, more expeditious, and less expensive. Grand juries frequently refuse to indict unless they feel that the community is in sympathy with their action. They thus become policy-forming agents and substitute their will

<sup>21</sup> Abraham Caruthers, *History of a Lawsuit* (5th Ed., 1919), 269-273.

<sup>22</sup> Women are eligible to jury service in twenty-one states. See Julia Margaret Hicks, *Women Jurors* (1928), 10.

for that of the state. Obviously courts are helpless unless indictments can be obtained. The tendency is in the direction of restricting the use of the grand jury to cases of graft or corruption of public officials or of exceptional importance or seriousness.

The trial jury has likewise received its share of criticisms. Its method of selection is cumbersome and expensive. The parties to the case and their lawyers are too influential in this process. Too many peremptory challenges are permitted; in fact challenges for cause seem entirely adequate.<sup>23</sup> The court should be a stronger factor in its selection. Jury service should be made difficult to evade as a means of securing a more intelligent and competent jury and should be extended to women on the same terms as to men.<sup>24</sup> Provisions should be made for less than a unanimous verdict in both civil and criminal cases with possibly a little less emphasis for this change in felonies or capital cases. The use of the jury should be optional with the parties in civil cases; the complicated character of civil litigation makes it exceedingly difficult for the ordinary jury to participate intelligently and efficiently in its adjudication. There should be provisions for waiver of jury trial in indictable offenses.<sup>25</sup> The right of jury trial should be extended to punishment for contempt in injunction cases.<sup>26</sup> The judge should be allowed to instruct the jury on the evidence as well as the law. This is the practice in both our federal courts and the English courts. The task of the modern jury is much more difficult than that of its ancient predecessor. The facts involved in modern litigation are more technical and complicated than was formerly the case. The jury should welcome the opinion of the court on the relative weight and significance of the evidence submitted to it. The present practice in most states leaves the jury to be swayed by advocacy with no judicial corrective and is largely responsible for many retrials to correct the verdicts of previous juries.

#### IV. JUDICIAL PROCEDURE

The courts have to apply not only the substantive law but also procedure law. Procedure law is a body of rules promulgated in part by legislatures and in part by the courts for the purpose of

<sup>23</sup> Robert von Waschzisker, *Trial By Jury* (1922), 87-103.

<sup>24</sup> Robert Stewart Sutcliffe, *Impressions of An Average Jurymen* (1922), 9-13.

<sup>25</sup> Robert H. Elder, "Trial by Jury: Is It Passing?" 6 *Am. L. Sch. Rev.*, No. 6, 290-300 (1928).

<sup>26</sup> *Illinois Constitutional Convention Bulletins* (1920), 842-843.

regulating the courts in their operation. In other words, the various steps in a trial are fixed in a definite order as well as the methods to be followed in taking these steps. These rules of procedure in the course of time have become exceedingly technical and difficult to follow. The action of a court to be legal or valid must be taken in conformity with these rules. These rules apply to the admission or exclusion of evidence, the summoning, selection, and instructing of jurors, the examination of witnesses, and the acceptance or rejection of various motions made by the attorneys in the case. An error committed by a court in the application of these rules generally means a retrial, which means delay, an additional expense, and frequently an advantage to one of the parties to the suit. While these rules are not the same for all the states for civil, criminal, and equity cases in the same state, there is sufficient uniformity to make it worth while to attempt to state without technicalities the chief steps involved in the trial of civil, criminal, and equity cases.

I. *Civil Procedure*. Judicial proceedings are initiated by means of an action brought by a plaintiff against a defendant. An action must involve a real controversy between two adversary parties. A civil action is begun by the plaintiff's filing in the proper court in writing a declaration (variously called a complaint, petition, or bill) in which he states the facts on which he bases his claim for redress. The clerk of the court then issues a writ or citation, containing the statement of the plaintiff and other matters of law such as the date of the opening of the next term of court. This writ is delivered to the sheriff or constable, who serves it upon the defendant who is named in the writ. If the defendant desires to contest the action, he files with the court an answer to the declaration of the plaintiff in which he states the basis of his defense.<sup>27</sup> It sometimes requires a series of cross firings between the plaintiff and the defendant, which are conducted by their attorneys, to reduce the action to a clear-cut issue.<sup>28</sup> When this process is completed, the court sets the time and place of trial, has the witnesses summoned, and a venire of jurors, if a jury is required or demanded by the parties. When the day of trial arrives, the jury is selected and sworn as previously indicated. The preliminaries now having been completed, the trial is ready to begin. The plaintiff's attorney opens the trial by briefly stating to the court and the jury

<sup>27</sup> If the defendant does not contest the action, there is no trial and the judge renders a decision in favor of the plaintiff.

<sup>28</sup> These cross-firings are called pleadings.

the purpose of the suit, the nature of the evidence, the parties to the case, and the damages which the jury will be asked to award the plaintiff for the injury he has sustained. The plaintiff's attorney then calls his witnesses, usually the plaintiff himself first; they are sworn and examined one by one by the plaintiff's attorney. This is called the "direct examination," which is followed by the cross-examination, conducted by the defendant's attorney, and confined to matters involved in the "direct examination."<sup>29</sup> The plaintiff's attorney is entitled to re-examine his witnesses on any new points which have been raised by the cross-examination.<sup>30</sup> The defendant's attorney then presents the cause of the defense and introduces his witnesses, whom he examines and the plaintiff's attorney cross-examines. The object of the defense is to disprove the facts alleged by the plaintiff. If after the introduction of all the evidence, it appears that either party has failed to establish his case sufficiently to justify its submission to the jury, the other party may ask for a directed verdict. If this request is sustained by the court, the judge instructs the jury as to the verdict to render. If, however, this situation does not develop, the trial proceeds to the arguments of the counsel. The plaintiff's attorney speaks first. After the arguments by the attorneys, the judge charges the jury. The judge's charge is usually submitted to the attorneys before it is delivered to the jury.<sup>31</sup> The purpose of the charge is to instruct the jury as to the law applicable to the case. The judge reviews the evidence, but reminds the jury that it is their recollection that is to govern and that their verdict must be given according to the weight of the evidence. Sometimes, the attorneys, if they are not satisfied with the charge, ask the judge to give additional instructions to the jury.<sup>32</sup> He may or may not comply with this request. Either attorney may take exception to the charge or to the refusal of the judge to give further instructions to the jury. The case is then given to the jury, which retires and prepares its verdict if it can agree. When the jury reaches a verdict, it returns to the jury box and its foreman announces its decision. If it is in favor of the plaintiff, the amount of damages assessed is stated. The jury is

<sup>29</sup> If the defendant's attorney wants to introduce new matter, he must call the witness to the stand as his own witness.

<sup>30</sup> Giving this cross examination, objections to evidence, motions to eliminate evidence, and bills of exception may be introduced to complicate and delay the trial.

<sup>31</sup> In some states the charge to the jury is made before the attorneys make their arguments. This is the practice in Texas.

<sup>32</sup> Sutcliffe, *op. cit.*, 40-43.



then dismissed for the day, and the judge renders the judgment of the court, which has the effect of converting the verdict of the jury into law.

2. *Criminal Procedure.* The state is the plaintiff in criminal actions, because the prosecution of criminals is recognized as necessary to the preservation of society. While in civil actions it is usually property rights that are involved, in criminal cases it is the welfare of society and such human rights as life and liberty. Civil litigation is left to individual initiative, whereas the prosecution of criminals is a state function and is, therefore, a matter of greater interest to students of government.

The preliminary matters in a criminal action include arrest, commitment, and indictment. Arrest of the alleged criminal is accomplished by means of a warrant issued by a competent judicial officer, judge, or justice of the peace, upon information or a complaint furnished under oath by the injured party or private prosecutor,<sup>33</sup> to a police officer, whose duty it is to produce the body of the person named in the warrant before a competent judicial officer of the district in which the alleged offender lives. When the alleged offender is brought before a magistrate of the law, judge, or justice of the peace, a preliminary hearing<sup>34</sup> takes place which may end in his being released or held for the action of the grand jury or trial courts. If a clear case of guilt is established, it is the duty of the committing magistrate to hold the offender for court. This may be done by imprisonment in jail or by bail. The right of bail is generally provided by the state constitutions except in capital offenses, and in some instances in these, if the evidence of guilt is not too strong. Bail is simply a bond made by sufficient sureties to guarantee the appearance of the offender at court. The committing magistrate determines the amount of the bond according to law. Indictment by a grand jury or by information as previously explained follows to complete the preliminaries for trial.

The trial is opened by a process called the arraignment and pleas. The defendant is arraigned before the court and his indictment is read. He is then asked whether he is guilty. If he pleads guilty, there is no trial, and the judge pronounces the sentence. If

<sup>33</sup> In most criminal prosecutions, there are two prosecutors: (1) the injured party known as the private prosecutor, and the public prosecutor who represents the state and is variously called district attorney, county attorney, state's attorney, or public prosecutor.

<sup>34</sup> If the offense is of a minor character, a summary trial may dispose of the matter. A summary trial is a trial before a magistrate without a jury, and is a regular method for disposing of minor offenses.

he pleads not guilty, a petit jury is selected as previously explained to try the case. If the case is serious, this step may be a long and tedious process. The defense, of course, will attempt to secure jurors of a rather low order of intelligence whose prejudices and emotions are suitable to its plea. The selection of a jury for a criminal case is a much more difficult matter than the choosing of a civil jury. When the jury is selected and sworn, the prosecuting attorney makes a statement of the case and introduces his witnesses. The trial then proceeds as in a civil case, with the examinations and cross-examinations of the witnesses of both the state and the defense, arguments of the counsel, charge to the jury by the judge, and the verdict of the jury. The arguments of the counsel in a criminal case lend themselves to a display of eloquence which is one of the many devices used to win the jury. The charge of the judge covers the legal aspects of the case, the various grades of the crime involved, the elements required for conviction in each grade, and the character of the evidence presented by both the prosecution and the defense. While there is no presumption in favor of either litigant in a civil action, the judge in his charge reminds the jury that the defendant's innocence must be assumed and that the burden of overcoming this presumption is upon the state. The defendant's guilt must be established "beyond a reasonable doubt." The judge, of course, attempts to make clear to the jury what reasonable doubt means, but such explanation is difficult to make and still more difficult to apply. If the judge is permitted to express his opinion on the evidence, he must remind the jury that it is its judgment that controls. His failure to do so amounts to reversible error. If the jury finds the accused guilty, the judge pronounces the sentence, the clerk prepares the execution papers, and the prisoner is delivered to the sheriff or a proper officer to be handled according to the terms of the sentence.<sup>35</sup>

3. *Equity Procedure.* A suit at equity is begun by the filing of a bill of complaint by the plaintiff. The defendant is subpoenaed to appear and state his defense on the penalty of having his case decided by default. The defendant may file a disclaimer (a denial of any interest in the matter) and he may demur. A demurrer is an admission of the facts alleged in the complaint, but a denial of their sufficiency to warrant an answer to the complaint by the defendant. He may make a plea upon some particular fact which

<sup>35</sup> There is no attempt in this discussion to explain the various possibilities that may arise at almost every stage of a criminal trial. For a more detailed explanation, see C. N. Callender, *American Courts* (1927), 182-198.

he desires the case to be tried or he may make a general denial of the alleged facts in the bill of complaint. The latter is known as an answer. The hearing of the case is generally before the judge alone, though in many jurisdictions a jury may be used where the differences between common law and equity proceedings have been abolished. Some states maintain separate courts of equity; others have one set of courts for both law and equity but preserve the two types of procedure; a third group makes no distinction as to procedure.<sup>36</sup> In the first two groups trial by jury is not used in equity cases. This is the practice of federal courts. The evidence in equity cases, if equity procedure is used, must be reduced to writing. The decision of an equity court is called a decree and directs the performance or non-performance of a specific act. If the decree should require the defendant to pay a sum of money, its execution would depend upon his financial responsibility.

## V. THE PROBLEM OF THE ADMINISTRATION OF JUSTICE

There are essentially only two factors that the successful operation of the state courts involves. These may be designated as (1) their mechanical features, and (2) the character of the officials connected with their operation—from the policeman to the governor. Of the two, it is submitted that the latter is far more important, though the emphasis in the past has been placed upon the former, and the result is a mechanical system of justice, with probably more mechanics than justice. The mechanical or structural features of the state judiciaries, including their organization, administration, and procedure, is primarily a matter for the consideration of the bench and the bar, but the character of our police force, judicial officials, lawyers, legislators, and governors is a problem that concerns the entire body of citizens. The organization of the courts and proposals for their reorganization and administration have been considered; it remains to suggest some changes in judicial procedure which have the general approval of the most able members of both the bench and the bar.

1. *Suggested Reforms in Court Procedure.* The rules of judicial procedure have become so technical that the courts cannot apply them without making frequent errors which are largely responsible for the delays, retrials, and appeals that prolong litigation and make it exceedingly expensive. These technicalities have resulted from judicial precedent and from legislation. Without attempting

<sup>36</sup> Callender, *op. cit.*, 136.

to say in just what respects the rules of civil and criminal procedure should be changed, it may be worth while to indicate some of the methods that have been suggested for remedying this situation.

a. *The Vesting of the Rule-Making Power in the State Supreme Courts.* It is certainly true that the legislatures are not as capable of formulating the rules of judicial procedure as the courts themselves. Legislatures make their rules of procedure, the courts should make theirs if for no other reason than to be responsible for the conduct of their own business. Judicial procedure is not a matter for a brief study and a hasty solution. It is a permanent problem and should be made the business of a group of legal experts representing the bench or both the bench and the bar, to make a constant study of the workings of the courts and to promulgate rules from time to time for their better operation. The state supreme courts under liberal practice acts passed by the legislatures could safely be trusted with this power.

A committee of judges exercises this power in Great Britain; the Supreme Court of the United States enjoys the rule-making power. In several states the courts of last resort exercise a limited rule-making power, and recent advances along this line have been made in Colorado (1913), Alabama and Michigan (1915), Virginia (1916), North Dakota (1919), New Jersey (1921), Delaware (1925), and Washington (1926).<sup>37</sup> Beginning with the Field Code of 1848 in New York, the legislatures of twenty-eight states have enacted either practice acts or codes. This action indicates that either the courts which formerly exercised the rule-making power at common law have abdicated this function or the legislatures have assumed it, regardless of the attitude of the courts. The bench and the bar are now generally advocating the restoration of this power to the courts, by legislative action if possible, or by constitutional amendment if necessary.<sup>38</sup>

b. *Reductions of Retrials and Appeals.* Simplification of the rules of judicial procedure would undoubtedly reduce the number of retrials and appeals because it would tend to decrease the number of procedural errors constantly being made by the courts. A large percentage of retrials and appeals is based upon errors of law made in the holdings of the courts. Better trial judges would largely eliminate these errors. A very serious defect running

<sup>37</sup> Josiah Marvel, "The Rule-Making Power of the Courts," 12 *Jour. of Am. Jud. Soc.*, No. 2, 55 (1928).

<sup>38</sup> See "Justice through Simplified Procedure," 73 *The Annals of the Am. Acad. of Pol. and Soc. Sci.*, 170-177 (1917).



throughout state courts is a lack of emphasis on the trial courts. An incompetent trial judge necessarily means retrials and appeals. The trial courts are the real judicial forums of the states. In many jurisdictions, particularly in the county courts, the trial judges do not even have to be members of the bar, and it is not unusual to hear one boast of not having been ruined by a study of the law. There should be some restriction on the right of appeal. A one-trial and one-appeal system should be established as far as possible. More than this should not be permitted as a matter of right, but a superior judge might be permitted on the examination of the record to remand the case for retrial or to review it. The trial courts are in the best position to get at the facts and they should be made sufficiently competent to have final jurisdiction of the facts. Review could then be restricted to points of law. It is doubtful if any appeal should be made to the supreme court of the state as a matter of right. Of course, the jury system is a factor in retrials. The tendency to make less use of the jury well as to accept less than a unanimous decision in many types of cases is somewhat reducing this factor. The extension of the principle of conciliation and arbitration to commercial disputes eliminates formal judicial procedure.<sup>39</sup>

c. *The Elimination of Delays in the Law.* The delays of the law are as old as the law, and are due to many factors. "Some of the law's delays," said former Justice Ransom, "are the lawyers' delays; some are the judges' delays; some are the litigants' delays; and many are fairly attributable to a conservative, tax-paying public, which is slow to sanction the creation of an adequate number of judges for the prompt dispatch of business and slower still to approve adequate salaries which will command for the bench the life-long services of men of first grade legal training and administrative talent, who could dispose of legal business diligently and acceptably."<sup>40</sup> The jury system, technicalities of procedure, and worship of mere forms and records are causes of delays. It requires an expert and experienced lawyer to file a case in court without making an error which will delay the case until the next term of court. Appeals are sometimes denied because a stenographer omits some word from the record of the trial court. As a recent critic has said, the courts seem sometimes to conduct

<sup>39</sup> See Harlan F. Stone, "The Scope and Limitation of Commercial Arbitration," 10 *Proceedings of the Acad. of Pol. Sci.*, 195-203 (1924).

<sup>40</sup> William L. Ransom, "The Law's Delays—Causes and Remedies," 10 *Proceedings of the Acad. of Pol. Sci.*, 181 (1924).

in the name of the state a sort of legal puzzle department. Delay is, of course, a factor in efficiency and accuracy, but unfortunately solicitude for these worthy ends is not always or mainly the object of delay. Delay in criminal cases is nearly always in the interest of the defendant, and his lawyer too frequently resorts to whatever tactics seem necessary to secure an advantage for him. Delays may amount to a miscarriage of justice. A really able judge who will be the master of his court is probably the best remedy for the delays in the law.

2. *The Human Agencies of Justice.* Important as these mechanical devices are in an efficient system of justice, they are really unimportant as compared with the great body of officials connected with the making and enforcement of the law.

a. *Better Law-Making Is Very Fundamental.* The legislative agent is largely responsible for the conditions of society that give rise to litigation both civil and criminal. It is too frequently either ignorant of them or lacks the courage or ability to remedy them. A large volume of legislation is enacted without a full appreciation of its effects upon society and litigation. Improperly framed and loosely drafted legislation which the courts through interpretation have to re-enact is a material factor in the partial breakdown of our courts. Any scheme for an efficient system of justice that does not advocate a more efficient legislative system is not only inadequate but does not strike the root of the problem. The fact is that if a proper judicial system is obtained, it must come directly or indirectly from the hands of the legislative agent, and be maintained efficiently or otherwise by the same means.

b. *The police system of the states* must be considered in this problem. In many states it is essentially a frontier contrivance composed of a host of independent and unrelated officers frequently incompetent and sometimes criminal. They are nearly always poorly paid and often decide that they are justified in rewarding themselves by exacting tribute from the criminal element. The county police forces should be under state organization and direction so that they could be readily mobilized and made, if necessary, to function in the interest of society. When a sheriff can tell a governor to return to his office and look after his own business, and thus nullify the work of the law-making and enforcing agents of the state, it is time to realize that frontier democracy has passed its day of usefulness. The detection of criminals is a highly technical matter, and the enforcement of law involves the safety and peace of society. The certainty of being caught is a

strong deterrent to the would-be criminal. Each state government should have a department under which the police force is organized and directed. As a matter of fact, it is almost a matter of sport for the expert criminal to play the game of fast and loose—seldom so fast as loose—with the county police system. It requires an efficient network of machinery statewide to cope with the methods of modern criminals.

c. *The Public Prosecutor.* In criminal cases the defendant, if he is financially able, is almost invariably defended by the most able criminal lawyers that money will secure. Society, however, trusts its interests to a poorly paid and necessarily weak prosecuting attorney. It is generally recognized that the legal game is largely a matter of wits. A team of astute lawyers opposing a simple and inexperienced prosecuting attorney in a court presided over by a toy judge with a jury of morons to pass upon the facts is a spectacle that might well be classed as a farce, a comedy, or a tragedy, but hardly as an instrument of justice. As exaggerated as this illustration may seem, it too frequently comes very close to representing the facts. No complicated scheme of mechanics is responsible for this situation, nor can the remedy be sought in mechanical devices. The most of the difficulty lies at the door of the great mass of citizens with possibly a good portion of it resting a little more heavily on the bench and the bar.

d. *Legal Organizations.* The initiative in judicial reform may rightly be expected to come from the judges and the lawyers, who by training and experience are best fitted for this task. Their efforts, however, are limited by the character of our legislatures which, of course, are the creatures of the voters. All educational agencies, therefore, have a place in the movement for judicial reform. Law schools in particular, and departments of government, should give courses in jurisprudence and judicial administration. The charge is not unfounded that too many law schools are simply trade schools and are uninterested in either the science or the administration of the law. Something more than legal knowledge is needed. Training in the social sciences, honor, and responsibility should be a part of the equipment of those who essay the difficult task of engineering society. The standards of admission to the bar cannot be too high. The bar is crowded with too many incompetent and irresponsible lawyers. It has not kept pace with the medical, engineering, and teaching professions in the matter of standards or of discipline over its members. The lawyer, as well as the judge, is a public officer, and he should lose his office when

he reflects discredit upon his profession.<sup>41</sup> After all, the lawyer is a potential judge and as our present state systems of courts work with figurehead judges, he is decidedly the strongest factor in their operation. The legal profession should not stand idly by and permit so-called democratic processes to elevate demagogues and moral weaklings of their order to important places of trust and destroy the respect which our legal institutions must have to maintain the democratic order of society.

<sup>41</sup> Andrew Alexander Bruce, *The American Judge* (1924), 146-158.

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**Part IV**  
**Local Government**



## CHAPTER XL

### THE MUNICIPALITY AND THE STATE

Municipal corporations are agents of the state, invested with certain subordinate governmental functions for reasons of convenience and public policy. They are created, governed, and the extent of their powers determined by the legislature, and subject to change, repeal, or total abolition at its will. They have no vested right in their offices, their charters, their corporate powers, or even their corporate existence.—*Commonwealth v. Moir* (1901), 199 Pa. 534.

#### I. THE LEGAL STATUS OF MUNICIPALITIES

The courts of the United States have not been in entire agreement upon the question of the legal status of municipalities. The doctrine of Justice Cooley maintained that there existed in municipalities an inherent right to local self-government.<sup>1</sup> This doctrine was based upon (1) the uninterrupted existence of a reasonably uniform system of local government in the colonies, (2) the development and defence of the liberties of the people upon such a system, and (3) its implied incorporation into the state constitutions.<sup>2</sup> This theory was so in harmony with the Anglo-Saxon tradition of local self-government that it found able supporters. "The chief characteristic feature of municipal corporations, beyond all others," said McQuillin, "is the inherent right of local self-government."<sup>3</sup> This view was also sustained by several of the earlier decisions of the courts.<sup>4</sup> However, it was never accorded complete acceptance.<sup>5</sup>

<sup>1</sup> *People ex rel. Le Roy v. Hurlbut et al* (1871), 24 Mich. 44.

<sup>2</sup> Thomas Cooley, *Constitutional Limitations* (8th Ed., 1927), I, 388.

<sup>3</sup> Eugene McQuillin, *Municipal Corporations* (1911-1913), I, 156, 254, 384, *et seq.*

<sup>4</sup> *Attorney General v. Lothrop* (1872), 24 Mich. 235; *Moreland v. Mellen* (1901), 85 N. W. 882; *Holt v. Denny* (1888), 118 Ind. 274; *Evansville v. State* (1888), 21 N. E. 267; *White v. Barker* (1902), 116 Ia. 96; *Lexington v. Thompson* (1902), 113 Ky. 540; *Ex parte Lewis* (1903), 45 Tex. Cr. App. 1.

<sup>5</sup> *Barnes v. District of Columbia* (1876), 91 U. S. 540; *Commonwealth v. Plaisted* (1888), 148 Mass. 375; *Metropolitan Railroad Co. v. District of Columbia* (1880), 132 U. S. 1; *Brown v. Galveston* (1903), 97 Texas 1; *Arnett v. State* (1907), 168 Ind. 180.



The generally accepted theory at the present time directly opposes the Cooley doctrine. "It must now be conceded," says Dillon, "that the great weight of authority denies *in toto* the existence, in the absence of special constitutional provision, of any inherent right of local self-government which is beyond legislative control."<sup>6</sup> This view is in general accord with the opinions of contemporary commentators and recent court decisions.<sup>7</sup> In fact, in a few instances states have not only denied the right of local self-government to cities, but have intervened and for brief periods actually administered the affairs of municipalities through state officers. The classic example of such action is the repealing of the charter of Memphis, Tennessee, and the establishment of the Shelby County Taxing District. The majority of the members of the governing board of the Taxing District were appointed by the governor in conjunction with the Quarterly Court. The administration of taxes due the extinct corporation at that time were then collected and disbursed in the interest of its creditors. About the same time (1879) the city of Mobile, Alabama, was also practically bankrupt. The legislature of Alabama revoked the charter of the city of Mobile, chartered a corporation known as the Port of Mobile, and created a commission of three members to administer the assets of the disestablished municipality. A Police Board was created to govern the Port, the members of which were, however, popularly elected.<sup>8</sup> Of a somewhat different character was the commission created by the Louisiana "carpet-bagger" legislature in 1870 to govern the city of New Orleans. The mayor and seven commissioners were elected at large, by an electorate the native white element of which had been disfranchised. This is generally supposed to have been the origin of commission government, since each of the commissioners was placed in charge of an administrative department of the city. In 1877, under this type of government the city became bankrupt, and during the following year mayor-council government was restored.<sup>9</sup> While the commission form was used as an emergency device, the precedent accounts for the evolution of this type of city government.

<sup>6</sup> J. F. Dillon, *Municipal Corporations* (5th Ed., 1911), I, 154.

<sup>7</sup> For a comprehensive discussion of this point, see H. L. McBain, "The Doctrine of an Inherent Right to Local Self-Government," 16 *Col. Law Rev.*, 190, 299.

<sup>8</sup> Thomas Harrison Reed, *Municipal Government in the United States* (1924), 200-202.

<sup>9</sup> See W. H. Howe, "Municipal History of New Orleans," *Johns Hopkins University Studies* (Seventh Series), IV (1889).

## II. CHARTER SYSTEMS

Why, it may be asked, in the face of this theory, are municipalities generally enjoying apparent autonomy and seemingly substantial rights of local self-government? The answer to this question is to be found in a consideration of the historical relation of state and local governments.

1. *The Special Charter System.* In the earlier period of our municipal development cities received their powers by a specific grant from the legislature. Thus, when Detroit, Chicago, or San Francisco wished to incorporate, the legislature of their respective state passed a specific bill authorizing the incorporation of the city, describing and fixing its corporate boundaries, prescribing the structure and organization of its governmental machinery, and determining the scope of its corporate powers. Under such a system municipalities were "constant supplicants at the bar of the legislature" for extensions of corporate authority and for special legislative favors. More significant, however, was the fact that cities were potential sources of political patronage of a very important sort. The result was that the legislatures of the states began literally to sell municipal franchises and construction projects, such as streets, utilities, and public buildings, and to compel extensive municipal subscription to the stock of private corporations. Eventually this burden became more than the municipalities were willing to bear, and constitutional restrictions upon the power of the legislature with reference to cities began to appear in the fundamental law of the states.<sup>10</sup> This began the movement for greater autonomy for cities.

The adherents of the system of special charters claim that it has certain inherent advantages. They contend that it makes it possible to adapt municipal organization and functions to local needs and thus to avoid the handicaps of a rigid uniformity. The varying needs of municipalities, it is said, require diversity in both the structure and functions of the political machinery. This system, however, in actual operation does not achieve these desirable results. In the first place, the legislature is not in a position to familiarize itself with the peculiar needs of each locality seeking to incorporate. In the second place, a serious consideration of such matters would amount to an unwarranted draft upon its time. In

<sup>10</sup> Howard Lee McBain, *The Law and Practice of Municipal Home Rule* (1916), Chs. I, II, III.

the third place, local interests are almost invariably subordinated to political considerations.<sup>11</sup>

2. *The General Charter System.* The failure of the special charter system caused some states to adopt a general or uniform charter for all municipal corporations within their jurisdiction.<sup>12</sup> The legislature of a state using this plan simply adopts a model charter which must be used by all municipal corporations within its jurisdiction. The outstanding defect of this plan is that it puts city government into a "strait-jacket." It places the small town and the metropolitan area in the same class. It secures simplicity and uniformity at the expense of the individuality of the community when in fact the chief purpose of incorporation is to provide the means for the adequate expression of the peculiar and unique forces of urban democracy. It fails also to recognize the fundamental differences that exist in the social, industrial, and cultural life of urban communities. However, this plan does largely eliminate legislative interference in municipal affairs.<sup>13</sup>

3. *The Classified Charter System.* A third solution of the problem of municipal incorporation is the classified charter plan. Under this system the cities are classified, usually on the basis of population, into three, four, or any desired number of groups. The legislature then devises a charter for each group. All cities within a group have a uniform charter. All legislation affecting municipalities also applies uniformly to groups. By means of group charters, it is sought to avoid the rigidity of the general charter plan and at the same time to prevent the political exploitation of municipalities apparently involved in the special charter system. The legislature of Ohio, however, very early discovered that it was possible to avoid the spirit of the plan and at the same time to observe its letter by classifying the cities in such detail as practically to establish the special charter system.<sup>14</sup> The object was to free the legislature from the limitations supposed to be imposed by the group system in the interest of the cities. As a result the Supreme Court of Ohio declared the classified charter system unconstitutional.<sup>15</sup>

<sup>11</sup> William Anderson, *American City Government* (1925), 48.

<sup>12</sup> Illinois adopted this plan in 1872 and Ohio in 1902.

<sup>13</sup> M. R. Maltbie, "Home Rule in Ohio," 6 *Mun. Affairs*, 234 (1902). See also, W. B. Munro, *The Government of American Cities* (3rd Ed., 1920), 53-79.

<sup>14</sup> Reed, *op. cit.*, 146; see also F. E. Horack, "Special Municipal Legislation in Iowa," 14 *Am. Pol. Sci. Rev.*, 423 (1920), and G. L. Schramm, "Special Legislation for New York Cities," 16 *Am. Pol. Sci. Rev.*, 102 (1922).

<sup>15</sup> *State ex rel Attorney General v. Cincinnati* (1870), 20 Ohio St. 18.

There are further difficulties involved in the classified charter system. Chief among these is the determination of the proper basis for differentiation in corporate structure and powers. Cities having approximately the same population do not necessarily have the same problems or require similar forms of government. Moreover, it seems indefensible to require a city to change its form of government merely because a growth in its population has placed it in another class. Almost any other basis of classification would be open to objections. While the classified charter system attempts to get away from form and provide some latitude in city organization, it succeeds only partially in accomplishing these objects. Form is still emphasized to the exclusion of substance.<sup>16</sup>

4. *Home Rule.* A fourth plan for chartering municipalities is known as home rule, which is now found in sixteen states. Broadly speaking, the system usually takes the form of a constitutional amendment or statutory enactment vesting in municipalities the power to form their own charters subject to the limitations of the state constitution and general laws and the Constitution and statutes of the United States. Corresponding prohibitions operate upon the state legislature concerning the enactment of special legislation for cities. Usually the procedure for adopting home rule charters is prescribed in the state constitution or statute conferring the power. Probably the plan most generally used is the formation of the charter by an elective charter commission and its ratification by the city electorate. Charter amendments may be proposed by a petition of the voters or by the municipal legislature, and may be adopted by popular ratification or by a two-thirds or three-fourths majority in the council.<sup>17</sup> Usually time limits are imposed upon the frequency with which amendments may be adopted.

Home rule has certain very obvious advantages, the most apparent of which is its elasticity. This feature is desirable for two reasons. In the first place, it permits the adoption of that form of governmental organization which the people of a city deem best suited to their peculiar situation. In the second place, it permits the municipality to vary its form of government in accordance with its changing conditions.<sup>18</sup> It differentiates urban from rural democracy and makes provision for its development unhampered

<sup>16</sup> I. W. Stratton, "The Antithesis of Home Rule," 10 *Mun. Affairs*, 4 (1921).

<sup>17</sup> For a summary of the principles of the home-rule system, see McBain, *op. cit.*, 656-684.

<sup>18</sup> Anderson, *op. cit.*, 64-65.



by the "keepers of the rural conscience." While the grant of home rule contains an enumeration of the powers of the municipality, it generally provides that "this enumeration shall not be construed to prohibit the exercise of other powers necessary to the welfare of the inhabitants." The result is that the only legal restrictions upon the expansion of the powers of the municipality are certain constitutional limitations and the law of public purpose.<sup>19</sup> The removal of the burden from the state legislature of passing upon many questions of a purely local character is an advantage to both the state and the municipality. It saves the time of the legislature for state-wide matters and frees it from numerous lobbyists. It leaves the management of municipal affairs to those most concerned and best prepared to handle them. Moreover, home rule makes the city a political science laboratory. It is undoubtedly true that the greatest progress that has been made in American government since the foundation of the Republic has been the contribution of American cities, due very largely to the freedom they have enjoyed in experimentation in governmental affairs. This feature of home rule confers one of its most beneficial results. It stimulates interest and activity in municipal affairs.<sup>20</sup>

Home rule, however, does not mean that each municipality can become a "little rock-ribbed republic" governed by a peripatetic prince. It merely grants self-determination in the structural arrangement of municipal machinery and freedom from external control in that restricted field of action designated as "strictly municipal affairs" whose boundaries are to be found in final analysis in the haze and mists of legal niceties.<sup>21</sup>

5. *The Optional Charter System.* The fifth method of municipal incorporation is a compromise between the general charter system and home rule, known as the optional charter plan. Under this system the state legislature adopts a number of model charters, and municipalities are free to choose the particular form which is best adapted to their local conditions.<sup>22</sup> The optional charter plan is designed to avoid the excessive rigidity of the general charter plan without granting freedom from legislative control to the degree accorded by home rule. It seems to harmonize

<sup>19</sup> See Reed, *op. cit.*, 158.

<sup>20</sup> W. B. Munro, *Municipal Government and Administration* (1923), I, 187.

<sup>21</sup> G. B. Noble, "Fight Against Encroachments Upon Home Rule in Oregon," 14 *Nat'l. Mun. Rev.*, 186 (1925).

<sup>22</sup> New York provides seven different charters, any one of which may be adopted by any city in the state except New York City, Rochester, and Buffalo. Massachusetts provides four alternatives; Virginia and North Carolina have adopted statutes similar to that of Massachusetts.

with contemporary theories as to the legal status of municipalities. Complete and unqualified home rule is not desirable and has never been granted under any system of municipal chartering. While the authorities are not in complete agreement upon the theory of this plan,<sup>23</sup> it has proved sufficiently meritorious in its practical operation to gain many adherents among those interested in the reform of municipal government in this country.

### III. LEGISLATIVE CONTROL

The control exercised by the state government over the municipality subsequent to the adoption of the charter may be either legislative or administrative in character. Legislative control takes the form of either special or general legislation. Special legislation was the first form of legislative control and it remained a necessary corollary of the special charter system. It was finally extended "into the very minutiae of city government"<sup>24</sup> and became a plague to both the legislature and the municipality. The result was that legislatures attempted to escape this burden by resorting to general legislation relating to certain major phases of municipal affairs. General legislation proved unsatisfactory for largely the same reasons that general charters failed to satisfy municipal requirements. It is practically impossible to adapt general legislation to particular situations. It places the municipality in a "cast iron mold, which is large in some places but tight in others, and very often tight in the wrong places."<sup>25</sup> The situation reached the condition in which the "average city could ascertain its charter provisions only by studying *first* its original charter, *secondly* all subsequent special laws amending the charter, and *thirdly* whatever general laws there might be on municipal affairs."<sup>26</sup> Furthermore, legislative regulation meant ultimately judicial control. This involved delay and permitted continual violation of charter provisions until suit was instituted and fought through the usual circuitous course of judicial procedure.

Probably the chief failures of legislative control have been in financial administration. The usual rule of law in the several states prohibits municipalities from issuing bonds without legislative sanction. An examination of state constitutions reveals the

<sup>23</sup> Munro, *Municipal Government and Administration*, I, 190-191; Reed, *op. cit.*, 150.

<sup>24</sup> H. L. McBain, *American City Progress and the Law* (1918), 3.

<sup>25</sup> Reed, *op. cit.*, 129.

<sup>26</sup> Anderson, *op. cit.*, 50.

fact that legislative control of municipal finance was either so lax or so arbitrary as to force the inhabitants of cities in self-defense to intervene and prescribe definite constitutional limitations upon municipal indebtedness.<sup>27</sup> Prior to the adoption of the Eighteenth Amendment and the Volstead Act, legislative control of municipal regulation of the sale of liquor was hardly more effective.<sup>28</sup> Mandatory provisions for the establishment of local boards of health and sanitary administrations have also been received with scant respect.<sup>29</sup> This condition has been very appropriately called the "official manifestation of lawlessness in American cities."<sup>30</sup> It was during the period of legislative control that Lord Bryce was impelled to designate our system of municipal government as the most conspicuous failure of the American Commonwealth.

#### IV. CENTRAL ADMINISTRATIVE CONTROL

Administrative control originated in Europe and much of the success of municipal government in Great Britain, France, and Prussia is due "to the relative absence of legislative control and the prevalence of administrative control."<sup>31</sup> Centralized control in Great Britain is exercised through administrative agents and grants-in-aid. Seven different agencies of the central government have the direction or supervision of such matters as health, police, education, agriculture, fisheries, labor, and pensions.<sup>32</sup> Grants-in-aid take the form of subsidizing local activities with a view to vitalizing them and making them more efficient. Such assistance is always accompanied by a certain amount of control. Administrative orders and private legislation are the chief means used by the central government in effecting its control over local areas.<sup>33</sup>

In France the Ministry of Interior through the prefect controls local police and finances. At least seven other ministries come in contact with municipal authorities in connection with such matters as military affairs, public works, education, commerce and indus-

<sup>27</sup> Frank J. Goodnow, *City Government in the United States* (1904), 99.

<sup>28</sup> *Ibid.*, 100.

<sup>29</sup> J. A. Fairlie, "Centralization of Administration in New York," 9 *Columbia Univ. Stud. in Hist., Eco., and Pub. Law*, 130 (1897).

<sup>30</sup> E. S. Griffith, *Modern Development of City Government* (1927), II, 579.

<sup>31</sup> Everett Kimball, *State and Municipal Government in the United States* (1922), 391.

<sup>32</sup> Sir Arthur Newsholme, *The Ministry of Health* (1925), 87. See also Sir Edward Troup, *The Home Office* (1925), 94-113.

<sup>33</sup> Goodnow, *Comparative Administrative Law* (1893), 268.

try, and agriculture. Mayors may be suspended by the prefects and removed by the President upon the recommendation of the Minister of Interior.<sup>34</sup> In Germany municipal government is under the control of both the Reich and the states. The mayors of municipalities are elected by their assemblies and are both state and local officers. They perform state functions in controlling local police and acting as public attorneys. Almost any matter in Germany may in final analysis become subject to police control.<sup>35</sup>

While centralization has by no means reached the stage of development in the United States in municipal affairs that has practically always prevailed in Great Britain and continental countries it is nevertheless true that our urban democracy is becoming so important and powerful in both national and state affairs as to require a new articulation of our governmental machinery and functions. This process of readjustment is not exclusively in the direction of the extension of central control over municipal affairs. There is abundant evidence to indicate that urban democracy is bidding for larger participation in both national and state affairs and is in some quarters already in a position largely to determine its relation to central authorities. In fact, rural life in certain sections of the country, mostly New England and the Central Northwest, is almost completely under the control of urban forces. Rapid industrialization, the increasing complexities of urban existence, and the facilitation of travel and commerce are creating a new structure of society that is in turn unifying our political order and forcing a redivision of governmental functions. The fact that central control is shifting from a legislative to an administrative character offers further guarantees to municipal autonomy.

Administrative regulation has some very definite advantages. It offers opportunity for thorough investigation and the solution of problems on a basis of facts. It is sufficiently flexible and adaptive in character to take cognizance of the peculiarities of communities and the variation in their problems. It removes political control from municipal affairs by vesting supervision in appointive and technically trained experts. However, the gradual abandonment of legislative control has not resulted in a diminution of state regulation of municipal affairs.<sup>36</sup> On the contrary, such regu-

<sup>34</sup> James, *op. cit.*, 59.

<sup>35</sup> Frederick F. Blachly and Miriam E. Oatman, *The Government and Administration of Germany* (1928), 298-370.

<sup>36</sup> H. G. James, *Local Government in the United States* (1921), 134 *et seq.*



lation has assumed a less insidious, a more effective, and logical character. While state control through administrative agencies is increasing, there is a balancing factor in the rapid multiplication of municipal functions. Statistics seem to indicate that municipal activities have expanded more rapidly than state control.<sup>37</sup> Thus, since these two tendencies will doubtless continue to characterize the further development of the relation between the city and the state, there is no well-founded apprehension that municipal autonomy is in danger of being crushed. The cities themselves will be a strong factor in determining the changing character of their status.

## V. THE ADMINISTRATIVE RELATIONS OF THE STATE AND THE MUNICIPALITY

A brief survey of the working relations of the state and the municipality in certain important matters will serve to indicate the scope and character of the administrative control of the former as well as the degree of autonomy of the latter. It must constantly be kept in mind that state supervision does not mean the exercise of municipal functions by the state and that legal theory is usually more arbitrary than its administration.

I. *Public Health.* While centralized administrative control of public health is probably in a more embryonic stage than other phases of state supervision, it has, nevertheless, made notable progress in recent years. State health boards were originally established primarily as research organizations, but they have come to exercise almost exclusively administrative activities. In about a dozen states the central health board exercises a marked degree of control over local health agencies. New Jersey authorizes her state board to prescribe examinations which all applicants must pass before they are granted eligibility to hold positions as sanitary inspectors. In a number of states the central board is empowered to organize local boards and appoint local authorities if the municipalities fail to do so.<sup>38</sup>

Communicable diseases and epidemics are usually under the control of state officers acting either in conjunction with or through local health agencies. Maritime quarantine is gradually being transferred to the Federal government as well as the control of

<sup>37</sup> Anderson, *op. cit.*, 417.

<sup>38</sup> J. A. Fairlie, *Local Government in Counties, Towns, and Villages* (1906), 237 *et seq.*

the more serious communicable diseases where local and state regulation is impracticable.<sup>39</sup> State officials are usually empowered to intervene in purely local affairs, but ordinarily they exercise such authority only in case of disagreement among local authorities or their refusal or failure to act.<sup>40</sup>

Other objects of concern to local health authorities which have been included in the jurisdiction of central administrative agencies are the protection of the purity of the public waters, the control of certain professions and trades, and the collection of vital statistics. The limitations upon municipalities with reference to property held outside their corporate limits have necessitated state control of public waters, since many municipalities go outside their boundaries for their water supplies.<sup>41</sup> The licensing of pharmacists, physicians, and morticians logically does not lend itself to municipal regulation. Likewise, the collection of vital statistics is too extensive a function to fall within the appropriate jurisdiction of the local health authorities.<sup>42</sup> In such instances state intervention is undoubtedly desirable.

2. *Education.* State supervision of education began in the early days of the Republic.<sup>43</sup> The Board of Regents established by the State of New York in 1784 has grown from a relatively unimportant advisory body to a highly centralized agency of administrative control. At the present time the elementary and secondary school systems of every state in the Union are organized in a more or less hierarchal administrative arrangement culminating in a central authority with considerable control over the entire system. All states except Massachusetts and Connecticut have an independent administrative officer at the head of the state school system. This state officer, together with the state board of education, forms the central educational administrative department and has general supervision over public schools, including the management and apportionment of the state school funds, the examination and certification of public school teachers, and the adoption of uniform textbooks. In some instances the control of the state

<sup>39</sup> Louisiana, for example, has asked the Federal government to take charge of yellow fever epidemics in that state.

<sup>40</sup> J. E. Pate, "Central Administrative Control of Municipalities in the Southwest," 8 *Southwestern Pol. and Soc. Sci. Quarterly*, 235 (1927).

<sup>41</sup> It should be explained that when a municipality holds lands or property outside of its corporate limits it holds it as proprietor, and may exercise proprietary, as opposed to governmental, rights of regulation.

<sup>42</sup> J. A. Fairlie, *Local Government in Counties, Towns, and Villages*, 244 *et seq.* See also H. G. James, *Municipal Functions* (1917), 1-24.

<sup>43</sup> See E. P. Cubberley, *Public School Administration* (1922), *passim*.

commission is extended to state teachers' colleges,<sup>44</sup> and even to state higher educational institutions.<sup>45</sup>

In the distribution of state school funds, the central authorities of the states have been able, by making these grants contingent upon the satisfaction of certain minimum educational and physical requirements, to bring the average of common-school education to a relatively high level.<sup>46</sup> State regulation of the public school curriculum, the entrance requirements to state institutions of collegiate rank, and the examination and certification of teachers has remedied a great many of the evils inherent in the local management of these matters.<sup>47</sup> Not only do most of the states provide for uniform textbooks but several have centralized the purchasing and distribution of textbooks.<sup>48</sup> California and Kansas even publish their own school texts.<sup>49</sup> Furthermore, some thirty states now have central library commissions to encourage and aid the establishment of libraries in towns and cities. As a result of the work of such agencies, practically every town in Massachusetts and Rhode Island,<sup>50</sup> has such a library. "There is no question," says Fairlie, "that the central control established has made educational conditions, particularly in rural districts, much better than they would be without this state supervision. And in most states a higher degree of central control than now exists would lead to further marked improvements in the local schools."<sup>51</sup>

3. *Road Construction.* The construction of public roads in the United States has largely been brought under central administrative control through both federal and state subsidization. In New Jersey at the present time the state pays a third of the construction cost, abutting property owners or the township pay one-tenth, and the county pays the rest. The road is constructed under the direct supervision of a state commissioner of public roads, who is appointed by the governor. In Massachusetts the roads are built under the direction of a state roads commission, consisting of three members appointed by the governor. The state pays the entire cost of the road but assesses one-fourth against the county. In Pennsylvania roads are built under the supervision of a state highway

<sup>44</sup> Massachusetts, Connecticut, New Jersey, Maryland, and Michigan.

<sup>45</sup> Iowa and Kansas.

<sup>46</sup> Fairlie, *Local Government in Counties, Towns, and Villages*, 220.

<sup>47</sup> *Ibid.*, 221.

<sup>48</sup> See Webster, "Recent Centralizing Tendencies in State Educational Administration," 8 *Columbia Univ. Stud. in Hist., Eco., and Public Law*.

<sup>49</sup> Fairlie, *Local Government in Counties, Towns and Villages*, 222.

<sup>50</sup> *Ibid.*, 224.

<sup>51</sup> *Ibid.*, 223.

commissioner. Two-thirds of the expense is borne by the state, one-sixth by the county, and one-sixth by the township. Pennsylvania also uses state funds for road maintenance. Since about 1903 the practice of state subsidization, and its corollary, state supervision, has been adopted in practically all states.<sup>52</sup>

4. *Local Officers.* It has been for a long time a legal maxim that municipal police are not local officers, but are agents of the state. This, however, has been totally disregarded with reference to the development of a system of centralized control over law enforcing agencies. While it is true that many states have developed somewhat elaborate systems of state police, such as the New York State Police, the Pennsylvania Constabulary, and the Texas Rangers, central administrative control over local officers has not been generally attempted. It is undoubtedly true that local police officers are inadequate for present needs. They are handicapped by territorial limitations, inadequate organization and training, and irresponsible and incompetent direction. They are not primarily local functionaries, but peace officers of the state. While they are, according to legal theory, state agents, central control is necessary to convert this theory into fact and need not involve any radical change in policy.<sup>53</sup>

5. *Municipal Finance.* Specific and iron-clad regulations concerning municipal expenditures and indebtedness have generally proved unsatisfactory and have caused many of the states in recent years to place the financial systems of their municipalities under central administrative control. Probably the most forward-looking of these measures is the comparatively recent Indiana statute providing that the State Board of Tax Commissioners, on petition of ten taxpayers, may review the budget or proposed bond issue of any city, county or village. The Commission is further authorized to reduce the budget and veto the bond issue.<sup>54</sup>

Inasmuch as no general attempt in the United States has been made in the direction of the separation of state and local revenue sources, considerable central supervision has become necessary in this field. Uniformity of taxation is possible only upon a basis of a fair and uniform valuation. The valuation of property by locally elected assessors is generally made on a political basis. Ohio and

<sup>52</sup> *Ibid.*, 264.

<sup>53</sup> *Ibid.*, 266 *et seq.*; Griffith, *op. cit.*, II, 594.

<sup>54</sup> Philip Zoercher, "The Indiana Scheme of Central Supervision of Local Expenditures," 14 *Nat'l. Mun. Rev.*, 90 (1925); Frank G. Bates, "State Control of Local Finance in Indiana," 22 *Am. Pol. Sci. Rev.*, 352-360 (1926).



Montana, recognizing this situation, provided in 1913 for the appointment of municipal assessors by the State Tax Commission, but were compelled to abolish this arrangement on account of local opposition. Wisconsin has attempted a solution by placing property assessment in the hands of the income tax assessors, who are completely under the control of the State Tax Commission. The appointment of assessors by the mayor, as in New York, the commission, as in Buffalo, or the city-manager, as in Cleveland, while undoubtedly a better method of selection than popular election by local constituencies, has not eliminated the political problem. Nor has appointment under civil service regulations been satisfactory. While the separation of the sources of state and local revenue might solve some phases of this problem,<sup>55</sup> state supervision and regulation seem to be more in line with the general scheme of readjusting state and local functions.<sup>56</sup> Undoubtedly state supervision of assessment is preferable to actual assessment by state agents.<sup>57</sup>

Uniform accounting and recording acts are comparatively recent development in the United States.<sup>58</sup> Prior to 1902 most of the measures adopted in this connection were not thoroughgoing, nor were they particularly satisfactory. Ohio, however, in that year provided for a uniform system under the direct control and supervision of a state bureau of inspection, a division of the State Auditing Department.<sup>59</sup> New York, by a somewhat haphazard process of evolution, has now a fairly well centralized system of uniform bookkeeping and accounting.<sup>60</sup> Needless to say, this expansion has been resisted very bitterly, as a matter of principle, by the more ardent advocates of home rule. However, it seems as important and necessary for the state to inspect and control the accounts of municipalities in this respect as it is to regulate banks, railroads, insurance companies, and other private or semi-public corporations.

Intelligent comparative study is an impossibility in the absence

<sup>55</sup> E. S. Griffith, *op. cit.*, I, 331, and II, 594, note 2; M. Newcomber, "Separation of Sources of State and Local Revenues in the United States," 76 *Columbia Univ. Stud. in Hist., Eco., and Pub. Law* (1917), No. 2, 44 *et seq.* For the opposing view, see H. L. Lutz, *Public Finance* (1924), 252.

<sup>56</sup> Anderson, *op. cit.*, 566.

<sup>57</sup> H. L. Lutz, "State Tax Commission and the Property Tax," 95 *Annals of the Am. Acad. of Pol. and Soc. Sci.*, 276 (1921).

<sup>58</sup> For a very good general treatise in this connection, see W. Kilpatrick, "State Supervision of Municipal Accounts," 12 *Nat'l. Mun. Rev.*, 247.

<sup>59</sup> Fairlie, *Local Government in Counties, Towns, and Villages*, 260.

<sup>60</sup> Fairlie, "Centralization of Administration in New York," 9 *Columbia Univ. Stud. in Hist., Eco., and Pub. Law*, 186 *et seq.*

of uniform systems of accounting and maintenance of records. Unit costs computed upon the same basis in different municipalities are indispensable to an evaluation of the relative efficiency of administrations. Such unit costs can have accuracy and statistical significance only when there is absolute certainty that the bases of computation have been the same in all instances.<sup>61</sup>

Municipal indebtedness has also become a matter of regulation by central administrative authorities. The necessity for its control has long been recognized by the presence of constitutional limitations upon the extent of municipal indebtedness. Massachusetts has established a central commission in her Bureau of Statistics which certifies all proposed town loans. This seems to be a logical solution of a problem which lies very close to the heart of municipal development. Constitutional limitations have proved too rigid; legislative control is ineffective and expensive. This function can undoubtedly be performed more efficiently by a permanent central administrative agent.<sup>62</sup>

6. *Public Utilities.* The case for state regulation of municipal utilities, whether publicly or privately owned and operated, presenting an almost unprecedented invasion of a sphere of jurisdiction which under the home-rule doctrine was considered as belonging exclusively to the municipality, is hardly less convincing than that for central control of functions more clearly of governmental character and of general interest and importance.<sup>63</sup> State control has been adopted usually because of the incapacity of municipalities to cope with problems of utility regulation in a manner satisfactory either to municipalities, utilities, or consumers. Municipalities may regulate public service companies by franchise provisions, ordinances, or public utility boards. Franchise regulation has proved universally unsatisfactory because (1) the provisions have been based usually on rules and rates prevalent in other cities rather than on an investigation of conditions at the situs of the franchise, (2) franchises generally contain so many provisions of a contractual nature that clauses relating to service and rates—the real basis of regulation—are accorded inadequate consideration, (3) the inelastic nature of the long-term, monopolistic franchise introduces an element of rigidity into the

<sup>61</sup> Reed, *op. cit.*, 132.

<sup>62</sup> W. P. Capes, *Modern City and Its Government* (1922), 235-250.

<sup>63</sup> Lent D. Upson, *Practice of Municipal Administration* (1926), 523-551; Morris L. Cooke, *Public Utility Regulation* (1924), Ch. XI; and C. M. Kneier, "State Regulation of Public Utilities," 14 *Univ. of Ill. Stud. in Social Sciences*, 64-117 (1926).

system which often operates injuriously to the interests of both utility and consumers, (4) the attempted remedy through the use of the short-term franchise has rendered almost impossible the adequate capitalization of utilities to operate under such uncertain guarantees.

The first two objections apply with equal force to regulation by municipal ordinance. Municipal councils do not generally have the capacity to consider the technical ramifications of fair evaluation, service costs, transmission losses, traffic statistics, legitimate return, depreciation, funding, and the other intricate problems which arise in connection with rate determination. Regulation by a specially constituted municipal utility commission is too expensive. Only the larger municipalities could pay the cost of the research and investigation involved in such regulation.<sup>64</sup> Furthermore, comparative studies of many items frequently are invaluable in rate determination. In the absence of centralized control of utility accounting and auditing, such studies are practically impossible. Such studies are becoming increasingly important in view of the changes necessary in general rate schedules, and the constant alteration of special rates, such as power charges.<sup>65</sup>

Where the utilities are publicly owned and operated the objections to franchise regulation are irrelevant. But frequently, publicly owned utilities are as inefficient and unjust in operation as private companies; hence the remarks concerning rate regulation are impartially applicable to both.

In summary it may be stated that municipal regulation of utilities whether by franchise or ordinance has the following serious defects: (1) its rigidity prevents a proper consideration of changing economic conditions involved in fair and just rate-making; (2) it lacks scope and authority to secure the necessary information on which to base intelligent regulation; (3) its cost, if it is scientifically conducted, is prohibitive upon all save the larger municipalities, and even there it is unnecessarily expensive as compared with central control.

The most compelling reason for central regulation is its jurisdictional character. Many of the companies supplying municipalities with transportation, light, power, gas, and other public utilities operate in several different cities. Central control is the only adequate and satisfactory form of regulation in such a situation.

<sup>64</sup> Halford Erickson, "Advantages of State Regulation," 57 *Annals of Am. Acad. of Pol. and Soc. Sci.*, 129, 137 (1915).

<sup>65</sup> *Ibid.*, 135.

Imagine the havoc wrought by conflicting local regulations of the schedule and rates of a transportation company operating in and between a dozen municipalities.<sup>66</sup> "Public utilities, although still comparatively simple industries," says Wilcox, "have gone far enough beyond merely local bounds to require complex governmental machinery to operate or regulate them."<sup>67</sup> The regulation of public utilities is about the same problem for the state as the regulation of interstate traffic is for the nation.

There need be no illusions with reference to the development of centralized administrative control in the United States. It is undeniable that there is a point beyond which it cannot be carried efficiently. But that point will, in the future, be determined entirely by considerations of administrative convenience, technical efficiency, and public policy, rather than by those of vested and inherent rights or sacred and inalienable liberties.<sup>68</sup>

<sup>66</sup> *Ibid.*, 146.

<sup>67</sup> Delos Wilcox, "Effects of State Regulation on Municipal Ownership," 57 *Annals of Am. Acad. of Pol. and Soc. Sci.*, 71.

<sup>68</sup> It must be noted that centralization of administration is regarded by some authorities with considerable alarm. See E. S. Griffith, *op. cit.*, II, Ch. XI; S. P. Jones, "State v. Local Regulation," 53 *Annals of Am. Acad. of Pol. and Soc. Sci.*, 87; C. K. Kohler, "Public Utility Regulation by Los Angeles," 53 *Annals of Am. Acad. of Pol. and Soc. Sci.*, 108.



## CHAPTER XLI

### THE DEVELOPMENT AND NATURE OF MUNICIPAL FUNCTIONS

No government can now expect to be permanent unless it guarantees progress as well as order; nor can it continue really to secure order unless it promotes progress.—JOHN STUART MILL.

#### I. EARLY INFLUENCES ON THE DEVELOPMENT OF MUNICIPAL FUNCTIONS

The query is oft repeated in the literature of municipal affairs: government or business, which? The answer is to be found only in a consideration of the functions of our municipalities, past, present, and probable future. The early development of municipal government in the United States came, unfortunately for contemporary purposes, upon the crest of the tidal wave of individualism which swept the country and largely determined the character of its political institutions, during the days of its infancy. In a country where doctrines of personal liberty were strong, the power of the state was necessarily weak, and where natural resources were unlimited—which that state in its impotency was not able to exploit—the philosophy of individualism was an inevitable development. Under the influence of such political philosophers as Herbert Spencer,<sup>1</sup> John Stuart Mill,<sup>2</sup> Thomas Paine,<sup>3</sup> and Thomas Jefferson who could see certain decadence resulting from the extension of governmental activities beyond the barest necessities for the preservation of the social order, the doctrine of laissez-faire was definitely incorporated into the political theory of the United States. And it is only in recent decades that it has been possible to regard even municipal socialism as anything short of heresy of the graver variety.

<sup>1</sup> H. Spencer, *Man Versus the State* (1784).

<sup>2</sup> J. S. Mill, *On Liberty* (1859), *Representative Government* (1860).

<sup>3</sup> Thomas Paine, *The American Crisis* (1776-1783).

## II. REASONS FOR THE EXPANSION IN MUNICIPAL FUNCTIONS

But to what shall be attributed this sudden rearrangement of our traditional political formula? Americans are today probably no more idealistic than were the embattled farmers at Lexington. Socialism has not yet appeared as a respectable phenomenon upon our national political horizon. Indeed, the answer is not to be found in abstract philosophical speculation.

1. *Urbanization.* Briefly stated, America, like Great Britain, is rapidly becoming very highly urbanized, and the problems created by people living in highly congested centers of population present difficulties to which the doctrine of laissez-faire cannot, without suicidal consequences, be applied. According to the census of 1920, approximately 51.4% of the people of the United States lived in urban areas, which are defined as being cities of 2,500 inhabitants or more. If to this strictly urban population there are added those persons living in incorporated areas of less than 2,500 population, what is commonly called the "agglomerated" population probably constitutes well over sixty per cent of the total population of the country. Comparative statistics for the early years of our national history are incomplete. However, in 1790 only 3.3% lived in cities of 8,000 or more. Thirty years later the proportion had increased to only 4.9%. In 1920 over 43.8% of the total population of the United States lived in cities of 8,000 or over.

2. *Failure of Laissez-Faire.* With this influx of population to the urban areas came new problems created by large groups of people living in close proximity. Cities are not merely aggregations of inhabitants. They are very different from rural areas and small towns. Their problems are unique, and cannot be solved by the individualistic formula of laissez-faire. Health, police, lighting, transportation, and city planning demand the immediate action of the local government. Without such action, disease, pestilence, crime, destruction, and death would be the lot of our larger centers of population. The experience of municipalities without regulatory machinery even when their populations were comparatively small forcefully demonstrated the necessity of governmental activity and control. Unrestricted private competition in certain phases of public service, such as lighting, gas, and transportation, led first to the bankruptcy and destruction of some of the competitors, then to the elimination of competition itself through the combination of the remaining forces, and finally to the

injustices resulting from unregulated monopoly. Uncontrolled private building made cities hideous, unsafe, unsanitary, and unlivable. Railroads and factories ruined the waterfront, or stifled in smoke and deafened with noise portions of the city which should have been devoted exclusively to residential purposes. In short, laissez-faire was discovered to be without bilateral implications. Self-interest, which the advocates of laissez-faire urged would ultimately be enlightened and public spirited, failed to provide an adequate standard for private conduct.<sup>4</sup>

3. *Scientific Progress*. "Ninety years ago the people of Detroit knew no better than to pump the water of the Detroit River into their mains untreated. Today an informed public opinion demands that it be filtered, and millions of dollars are spent in the erection of enormous batteries of filter beds." In 1860, milk was merely something to drink without question. Now it is not fit for consumption until the local government has graded it and guaranteed its purity.

4. *Social Service*. "We are no longer content that the poor shall crowd in rotting, unsanitary tenements. As a result we have housing codes and tenement house inspectors. . . . Every year our cities go in for more tuberculosis camps, schools for defectives, and psychological clinics. Next year may bring new activities not yet suspected."<sup>5</sup> It is primarily in the field of social welfare that the new activities of municipalities have developed. The awakening of the city dwellers to a new social consciousness is the most significant tendency of the twentieth century in municipal development and it has led to the assumption of a multiplicity of functions by the modern municipality.

5. *The Substitution of Government Regulation for Competitive Control*. With the gradual decline of accentuated individualism there came a tendency toward the collectivistic point of view, developing primarily, of course, in the form of governmental regulation. One need but glance at the political platforms of the late nineties and the earlier years of the twentieth century to understand how completely America had become reconciled to governmental regulation and control, at least of certain branches of industry.<sup>6</sup> Since that time the government has constantly intervened to protect the people against impure and harmful foods and drugs, to prevent discrimination and unfairness by common carriers and

<sup>4</sup> William Anderson, *American City Government* (1925), 398-401.

<sup>5</sup> T. H. Reed, *Municipal Government in the United States* (1926), 40.

<sup>6</sup> E. M. Sait, *American Parties and Elections* (1927), 119, 124, 129 *et seq.*

public utilities, to suppress monopolies and trusts, to forbid the sale of blue-sky securities, and, directly or indirectly, to subsidize manufacturers, farmers, or almost any group with a sufficiently powerful lobby.

6. *The Acceptance of Municipal Ownership and Operation.* The expansion of governmental control brought with it the realization that there were certain services for the performance of which the government was peculiarly adapted. From a minor administrative and governmental area of the state the city evolved into a gigantic corporation, performing for its inhabitants many and diverse services which formerly had been left exclusively to private initiative and enterprise.<sup>7</sup> Its corporate functions began to outgrow, and ultimately to dwarf those services in which it engaged as an administrative subdivision of the state. These functions grew very rapidly. "Already," said Zueblin in 1922, "this century has witnessed the first municipalized street railways and telephones in American cities; a national epidemic of street paving and cleaning; the quadrupling of electric lighting service and the national appropriation of display lighting; a successful crusade against dirt of all kinds—smoke, flies, germs—and the diffusion of constructive provisions for health, like baths, laundries, comfort stations, milk stations, school nurses, and open air schools; fire prevention; the humanizing of the police and the advent of the policewoman; the transforming of some municipal courts into institutions for the prevention of crime and the cure of offenders; the elaboration of the school curriculum to give every child a complete education from the kindergarten to the vocational course in school or university or shop; municipal reference libraries; the completion of park systems in most large cities and the acceptance of the principle that the smallest city without a park and playground is not quite civilized; the modern playground movement giving organized and directed play to young and old; the social center; the democratic art museum; municipal theaters; the commission form of government; the city manager; home rule for cities; direct legislation—a greater advance than the whole nineteenth century compassed."<sup>8</sup> Whether or not the expansion of municipal functions will stop short of the municipalization of all public services is a matter of speculation beyond the appropriate province of this discussion. In the solution of this matter theory must be subordinated to the facts of the situation.

<sup>7</sup> Anderson, *op. cit.*, 399.

<sup>8</sup> Charles Zueblin, *American Municipal Progress* (1922), xi-xii.



## III. THE NATURE OF MUNICIPAL FUNCTIONS

The traditional concept of municipal corporations divides their functions into two general classes—governmental and corporate. This distinction has long since ceased to have vital significance except for the purpose of determining the liability of the city in action for the torts of its officers.<sup>9</sup> For purposes of discussion, however, the line continues to be drawn, and in that connection may have some practical value. "It is a well understood fact," said Justice Cooley, "that these [municipal] corporations are of a two-fold character; the one public, as regards the state at large in so far as they are its agents in government; the other private, in so far as they are to provide the local necessities and conveniences for their own citizens."<sup>10</sup> In other words, in certain capacities the city acts as the agent of the state; in other respects it acts as a corporation, having the same rights and subject to the same limitations as a private person.

In connection with the first group of functions, it is observed that the municipality is charged with the responsibility of carrying out state laws. In this capacity it is an agent of the state, and in order that it may more efficiently serve the state, it is endowed with substantial governmental powers, such as the right to establish courts with a certain defined jurisdiction, and, more important, the power to tax. In this group are generally included also police and fire protection, education, building inspection, regulation of business and theatres, parks and playgrounds, city hall, charities and corrections, city jail, streets, bridges, viaducts, sidewalks, and sewers.<sup>11</sup> While the construction of streets, sidewalks, bridges, viaducts, and sewers is a governmental function, their maintenance, so the courts have held, is a corporate duty. Even in the performance of some of the functions classified as governmental the city is not, in reality, the active agent of the state. For this reason the discussion of governmental functions will be confined to those activities in which the relationship of the city to the state is actively present and immediate, rather than historical, remote, and only legalistic. The distinguishing characteristic of these functions is that they are supported almost entirely by taxation, and practically all are supplied alike to every citizen or

<sup>9</sup> See *Fowler v. Cleveland* (1919), 126 N. E. 73; *Workman v. New York City* (1900), 179 U. S. 552.

<sup>10</sup> *Le Roy v. Hurlbut* (1871), 24 Mich. 44.

<sup>11</sup> Anderson, *op. cit.*, 126.

householder without specific charge for benefit received.<sup>12</sup> It should be mentioned also that the city is not liable for torts committed by municipal officers in the performance of governmental functions. "They are of such a nature that, if there were no city governments," says Anderson, "they would be supplied directly by the state. Even the fact that small fees are charged in connection with some of them does not change their essential character. Hence, though one is attacked by a drunken policeman, injured by the fire department, or denied adequate protection against smallpox in the city's schools or hospitals, the city is not liable. There may be suit against the policeman, fireman, health or school officials personally, but not against the municipal corporation."<sup>13</sup>

#### IV. THE GOVERNMENTAL FUNCTIONS OF THE CITY

The character of the governmental functions of the city may best be indicated by a brief discussion of the various capacities in which it acts as the agent of the state.

I. *Area for Assessment of Taxes.* A rather important governmental function which merits some discussion is the service which the city renders as a local area for the assessment and collection of taxes. The practices of the states vary widely with reference to this function. In some instances assessments and collections are made for both rural and urban areas by the counties; in others, the valuations of municipal assessors are taken for the basis of the levy; and in still others, the city assesses and collects the taxes for the state. This particular feature frequently provokes conflict of interests and is largely responsible for the development of centralized administrative control of assessments. The relation of the state and the municipality in this matter is a problem which, apparently, is far from a satisfactory solution, the nature of whose ultimate settlement is a matter of speculation beyond the scope of this discussion.

With reference to its power of taxation for local purposes, however, the rights of the municipality are usually rather extensive. Subject to certain constitutional and statutory limitations, it may levy taxes for any public purpose, and in addition exercises the right of eminent domain, involving the possibility of profit from excess condemnation. It may make special assessments and im-

<sup>12</sup> This would not be true of sewers and similar services, however.

<sup>13</sup> Anderson, *op. cit.*, 127.

pose fees, fines, and charges for various municipal services. In the absence of a separation of the sources of state and local revenue and of excessive constitutional or statutory limitations, municipalities have potentially as much revenue as their citizens are willing to contribute.

2. *Election Districts.* Cities also serve the state as election districts in state elections. As election districts they are under the same control of the state as all rural areas. The election officials are not city officers, but are state agents selected by designated local authorities acting for the state. Election expenses in state elections are not a charge against the city. The cities as corporations do not participate in state elections, though their corporate territory is an election unit and their inhabitants, if they exercise the franchise, must vote within its limits. In this matter cities become a mere state convenience with the status of a quasi-corporation. Their machinery is not used as is the case in the administration of justice or police affairs.

These districts also serve as the basis of representation of the cities in the state legislature where representation is not based on counties. This is particularly true in New England and results in gross discrimination against urban populations. Of course, the same results occur where counties are a hard and fixed basis of representation, since population there is not a consideration.<sup>14</sup>

3. *Area for Police Administration.* Without question, one of the most necessary functions devolving upon municipalities as agents of the state is that of serving as local areas of police administration. While local officers are chosen by the municipal electorate and receive their remuneration from the city they are, nevertheless, state officials. "The state can tolerate—nay, even encourage—local divergencies in education policy or health administration; it can overlook occasional shortcoming in municipal trading and public welfare, in order to preserve local self-government; but it cannot tolerate divergencies from its law, and it cannot overlook shortcomings in justice. *The first functions are matters of expediency; the latter are questions of the principle that makes government possible.*"<sup>15</sup> So positive a statement as this from an avowed proponent of home rule lends added emphasis to the gravity of the problem of local police administration and to the mandatory character of this delegation of state authority.

<sup>14</sup> See Ch. XXXII.

<sup>15</sup> E. S. Griffith, *The Modern Development of City Government* (1927), I, 394.

4. *Judicial District.* Another function of equal significance with police administration which municipalities perform as agents of the state is the administration of justice. The organization and jurisdiction of municipal courts are determined by the state constitutions or statutes. Their jurisdiction is determined by the amount involved in civil matters, or by the nature of the offense in criminal matters. Municipal courts, like municipal peace officers, although employed, paid, and controlled in very large measure by the municipality, are in fact agencies of the state. They exercise only limited jurisdiction and in most instances appeals from their decisions may be taken to the higher courts. By this means the municipal courts become, in reality, integral parts of the state judiciary.

These, in summary, are the governmental powers with which municipalities customarily have been endowed, and which at the present time are very intimately articulated with the general state administrative system. But in recent years the functions which the municipality performs as a corporation, partaking chiefly of the nature of private enterprises, have come to occupy the forefront in any discussion of municipal affairs. "In many of its more important aspects a modern American city is not so much a miniature State as it is a business corporation—its business being wisely to administer the local affairs and economically to expend the revenue of an incorporated community. As we learn this lesson and apply business methods to municipal affairs, we are on the right road to better and more satisfactory results."<sup>16</sup>

## V. THE CORPORATE FUNCTIONS OF THE CITY

"The functions of the English municipality in the second half of the seventeenth century, when its institutions first were transplanted to this continent, were comparatively few."<sup>17</sup> It owned and controlled real estate, issued professional and commercial licenses, and exercised limited judicial powers, very restricted powers of local legislation, and a highly circumscribed power of taxation. The first permanent, paid police force was established in New York City in 1762. A few years earlier a hand-pump had been imported from England, and voluntary fire companies made their appearance shortly thereafter. The first reservoir was begun just before the revolution.<sup>18</sup> Boston, though at this time the liter-

<sup>16</sup> J. F. Dillon, *Municipal Corporations*, I, 38.

<sup>17</sup> Reed, *op. cit.*, 33.

<sup>18</sup> *Ibid.*, 37.



ary and cultural center of America, was in a sadder plight than New York. The late Dr. Charles W. Eliot, in describing the Boston of his childhood, said: "There was no public water supply. Water for household use was brought in buckets from neighboring wells. There was no sewer in the entire town, although it had a population of more than 50,000, and no pavement except a cobblestone pavement in a few of the principal streets. There were no street lights to speak of,—only a few scattered whale-oil lamps. Protection against fire was afforded by a hand-pump and a voluntary bucket brigade."<sup>19</sup> And this was well into the nineteenth century. Indeed, it is only since about 1850 that many of the activities of the present-day city have made their appearance, thus transforming the modern city into a social service institution.

The only comprehensive study of the expansion of municipal functions in a typical city has been made by Dr. Lent D. Upson.<sup>20</sup> In 1824 the city of Detroit performed eleven functions, of which only five were line activities, *i.e.*, rendering direct service to the citizens. From 1824 to 1860 only ten new functions were added. By 1880 Detroit had a population of 116,000 people, but during the twenty years had added only fourteen new functions. Only ten of the thirty-five functions then performed were line activities. The rest were staff or institutional activities. The four decades from 1880 to 1920 witnessed a ninefold increase of population and a fourfold multiplication of the activities of the municipality. At the present time that city performs 184 services, the vast majority of which are purely corporate functions, rendering direct service to the city of Detroit.

Of singular significance for our purposes is the fact that this extraordinary expansion of functions has been in the field of corporate activities. The growth in the functions of Detroit has followed two lines of development: first, the diversification and development of the traditional activities of municipalities, and, second, the inauguration of new activities formerly not performed by municipalities. The educational development of Detroit is a very good example of the first sort of increase. In 1824 that municipality began with the provision of an elementary school. Between 1825 and 1861 a high school was added and provision made for a school census. In the twenty years between 1860 and 1880

<sup>19</sup> W. B. Munro, *op. cit.*, I, 99, note 1. (Dr. Eliot was born in Boston, March 20, 1834.)

<sup>20</sup> "The Growth of a City," *Public Business*, Detroit, No. 70 (June 1, 1922); also the same author's "Increasing Activities and Increasing Costs," 11 *Nat'l. Mun. Rev.*, 317 (October, 1922).

a library and evening school were added to the educational equipment of the city. Between 1880 and 1920 thirty-nine educational activities were added. Work of collegiate and professional school grade began to be offered; provision was made for the training of teachers; evening schools were established, summer schools were introduced; special schools for the blind, deaf, and retarded were instituted; the library expanded and increased its facilities through branch libraries and reading rooms. Thus, from a very humble beginning has evolved a complete, modern, urban educational system.

Examples of the second type of expansion might be multiplied almost without end. The city of Detroit now owns and operates motor buses, ferries, and a street railway system; maintains recreation camps, aquariums, conservatories; and supports and conducts psychological clinics, tuberculosis camps, maternity hospitals, venereal clinics, and nutrition services. A broadcasting station, airports, art galleries, theaters, baseball teams, football teams, junior colleges, universities, natatoriums, milk supplies, and zoölogical gardens are coming to be recognized as necessary parts of the normal equipment of the larger urban centers.

## VI. LIMITATIONS UPON THE EXPANSION OF MUNICIPAL FUNCTIONS

The question naturally arises as to the ultimate limitations upon the expansion of municipal functions. Positive limitations are difficult to discover, but there are nevertheless some practical restrictions upon such development.

1. *Fiscal Limitations.* "Ultimately," says Lutz, "the limits of state activity will be set, not so much by any precise theory concerning the field of proper state functions, as by the burden of taxation involved and the general judgment of the people regarding a further increase of this load in view of the prospective advantages to be had from the additional services rendered."<sup>21</sup> This means that the principle of the maximum social advantage has its practical limitations. While theoretically the functions of government should expand as long as greater social gain is derived from the public use of the money spent than would be derived from its private use for other purposes, practically the revenue burden is likely to stop such expansion far short of this theoretical goal. Unfortunately, public revenue is not primarily

<sup>21</sup> H. L. Lutz, *Public Finance* (1924), 31.

derived from that portion of our revenues which would otherwise be used to least social advantage. The burden of taxation like the rain falls upon the just as well as the unjust<sup>22</sup> and usually the invisible government determines who shall bear it.

2. *Legal Restrictions.* More tangible, however, than the limitations suggested by Lutz and Stamp are those imposed upon municipalities by what has come to be known as the law of public purpose. "The legal phase becomes of special significance as the city enters those fields of activity which are not strictly governmental but are rather corporate in their nature. The engagement of the city in such activities is (usually) attacked as being other than a proper municipal function, and as being taxation for other than a public purpose."<sup>23</sup> Over fifty years ago Judge John F. Dillon, after reading and comparing all of the decisions of American courts on this question, said: "It is a general and undisputed proposition of law that a municipal corporation possesses, and can exercise, the following powers, and no others: first, those granted in express words; second, those necessarily or fairly implied in, or incident to, the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of a power is resolved by the court against the corporation, and the power is denied."<sup>24</sup>

This is the classic Dillon's rule—the rule of strict construction. But judges have, in recent years, become somewhat reticent about rigid adherence to this principle.<sup>25</sup> A consideration of the more recent holdings of the courts shows a changing attitude tending to become more liberal, due, in part probably, to the need of meeting the changed conditions and problems of the time.<sup>26</sup> Courts, however, are notably ponderous—the wheels of justice grind slowly—and in consequence impart an appreciably conservative tone to the whole program of municipal expansion. This, however, is doubtless as it should be. "If at the same time cities and other local units should be permitted to assume new functions *ad libitum*, without even a 'by your leave' to the state authorities," says

<sup>22</sup> *Ibid.*, 32. See also in this connection, Sir Josiah Stamp, *The Principles of Taxation* (1921), 1-24, 92-129, 130-198.

<sup>23</sup> C. M. Kneier, "Municipal Functions and the Law of Public Purpose," 67 *Penn. Law Rev.*, 324 (1928).

<sup>24</sup> Dillon, *op. cit.*, I, 237.

<sup>25</sup> H. L. McBain, *American City Progress and the Law* (1918), 30-57.

<sup>26</sup> Kneier, *op. cit.*, 341.

Anderson, "the states would indeed be as one caught between the upper and nether millstones." <sup>27</sup>

The principle has definitely been established that municipalities may levy taxes only for a public purpose.<sup>28</sup> The difficulty in applying this principle lies in deciding what constitutes a public purpose. The courts have not agreed on the standards to be used in judging of public purpose. In several cases the courts have laid great emphasis on custom and settled usage in determining the purpose of taxation.<sup>29</sup> But blindly to follow the doctrine of *stare decisis* and permit only those things to be done which are customary would be "essentially vicious and erroneous. Growth and extension are as necessary in the domain of municipal action as in the domain of law." <sup>30</sup> The problem of public purpose is a "changing one, changing to suit industrial inventions and developments and to meet new conditions." <sup>31</sup>

It has been declared that if a project is entered into for gain or for private objects it is not a public purpose. "Gain or loss incidentally may follow, but the purpose must be primarily to satisfy the need, or contribute to the convenience of the city at large." <sup>32</sup> In the light of this holding, courts subsequently have agreed that waterworks and electric lighting plants are legitimate municipal enterprises.<sup>33</sup> The doctrine has since been extended to include the right to supply natural gas to the citizens of the municipality.<sup>34</sup> It has been declared properly within the meaning of public purpose for a city to own and operate a street railway or to construct a tube for lease to a subway company for the benefit of its inhabitants.<sup>35</sup> Other functions which have been declared properly municipal are the ownership and operation of ferries, wharves, municipal markets, and public baths.<sup>36</sup> The legitimacy of public provision of natatoriums has been judicially determined.

<sup>27</sup> Anderson, *op. cit.*, III.

<sup>28</sup> McBain, *American City Progress and the Law*, Chs. V-IX. See by the same author, "Taxation for a Private Purpose," 29 *Pol. Sci. Quar.*, 185-213 (June, 1914).

<sup>29</sup> *Loan Association v. Topeka* (1875), 20 Wallace 655; *People v. Salem* (1870), 20 Mich. 452.

<sup>30</sup> *Sun Printing and Publishing Ass'n. v. New York* (1897), 152 N. Y. 257.

<sup>31</sup> *City of Tombstone v. Macia* (1926), 245 Pac. 677.

<sup>32</sup> *Lumber Co. v. City of Waseca* (1922), 152 Minn. 201.

<sup>33</sup> *Omaha v. Omaha Water Co.* (1910), 218 U. S. 180; *Jackson Electric Co. v. Jacksonville* (1895), 18 So. 677; contra, *Mauldin v. Greenville* (1890), 11 S. E. 434.

<sup>34</sup> *State v. Toledo* (1891), 48 Ohio 112.

<sup>35</sup> *Prince v. Croker* (1896), 166 Mass. 347.

<sup>36</sup> *Attorney General v. Boston* (1877), 123 Mass. 460; *Hofner v. St. Louis* (1901), 161 Missouri 34; *Spalding v. Lowell* (1839), 40 Mass. 71; *State v.*



Considerably more difficult of determination has been the question of municipal provision of fuel yards. This right was denied in several cases,<sup>37</sup> but later decisions seem to have disregarded this earlier action.<sup>38</sup> The supreme court of Maine has argued very logically that if a municipality can have a central gas, electric, or heating plant, there appear no legitimate objections to its selling fuel in the form of coal.<sup>39</sup> The United States Supreme Court has accepted two tests laid down by the Maine court in determining public purpose: is the article a necessity of life, and is it, under present economic conditions, not regulated by competition in the ordinary channels of private enterprise? It has also declared that it will largely be governed by the decisions of state courts in finally passing upon rights arising under the Fourteenth Amendment because of the superior advantages which the state authorities enjoy in judging questions of public purpose and necessity.<sup>40</sup>

The problem of the validity of municipal ownership and operation of ice plants has also caused considerable litigation. The supreme court of Georgia was of the opinion that if municipal fuel yards were necessities in Maine, municipal ice plants were equally necessary in Georgia. It also proposed the legitimacy of municipal operation of ice plants on the grounds that ice is simply water in a frozen condition.<sup>41</sup> The Louisiana court, while admitting the physical and metaphysical accuracy of the Georgia tribunal, took exception on the ground that water distribution involves the use of the public streets, whereas ice manufacture is a purely competitive enterprise.<sup>42</sup> Arizona has sustained municipal ownership on the ground of necessity;<sup>43</sup> but Missouri has denied the validity of this principle on the ground that rates are adequately regulated by private competition.<sup>44</sup>

It has been decided that while a municipality may not construct buildings for rental purposes, it may, where it has constructed a municipal building in good faith and for public purposes, allow

*Madison* (1858), 7 Wisconsin 788; *Bolster v. Lawrence* (1917), 255 Mass. 387.

<sup>37</sup> *Baker v. Grand Rapids* (1906), 142 Mich. 687.

<sup>38</sup> *Consumers Coal Co. v. Lincoln* (1922), 109 Nebraska 5.

<sup>39</sup> *Laughlin v. Portland* (1914), 111 Maine 486.

<sup>40</sup> *Jones v. Portland* (1917), 245 U. S. 217; *Clark v. Nash* (1922), 198 U. S. 361.

<sup>41</sup> *Halton v. Camilla* (1910), 134 Ga. 560.

<sup>42</sup> *Union Ice and Coal Co. v. Ruston* (1914), 135 La. 898.

<sup>43</sup> *Tombstone v. Macia* (1926), 245 Pac. 677.

<sup>44</sup> *State v. Orear* (1919), 277 Missouri 303.

part of it to be used incidentally for other purposes.<sup>45</sup> When the housing situation becomes as acute in the United States as it is in England, this doctrine will doubtless be liberalized. The right of governmental regulation has been recognized by the Supreme Court of the United States on the grounds of war emergency.<sup>46</sup> If the emergency should become chronic, it is but a brief step to municipal construction and operation.

The supreme court of Washington has declared that a municipality may tax for the purpose of purchase, improvement, and settlement of undeveloped agricultural lands which may later be sold to private individuals,<sup>47</sup> implying that a municipality may purchase and develop portions of its corporate area, and subsequently sell them.

The right of municipalities to purchase lands for the construction of golf courses for public use has been sustained in several instances.<sup>48</sup> Kentucky has also held valid the establishment and operation by the municipality of a golf supplies store at a municipal links.<sup>49</sup> Ohio has refused to allow her municipalities to operate theatres; Maine has declared the establishment of manufactories not within the meaning of public purpose; South Dakota has allowed her municipalities to construct and operate telephone systems; and Nebraska has permitted her cities to sell oil and gasoline.<sup>50</sup>

In the foregoing decisions of American courts a gradual expansion and elastic development of the law of public purpose as applied to municipal functions is clearly recognized. "Things formerly felt to be entirely within the domain of private competitive enterprise are now being assumed by municipalities as proper governmental functions. . . . The courts, in deciding upon the legality of such functions, have taken what might be termed a liberal or progressive attitude. . . . Public purpose as applied to taxation is a changing concept. It is fortunate that the courts have not placed a narrow interpretation upon the law of public purpose, but have been cognizant of the fact that times change.

<sup>45</sup> *Wheelock v. Lowell* (1907), 196 Mass. 220; *Warden v. New Bedford* (1881), 131 Mass. 23.

<sup>46</sup> *Block v. Hirsh* (1921), 256 U. S. 135; *Marcus Brown Holding Co. v. Feldman* (1921), 256 U. S. 170.

<sup>47</sup> *State v. Clausen* (1920), 110 Wash. 525. This seems considerably to broaden the comprehension of "public purpose."

<sup>48</sup> *Capen v. Portland* (1924), 112 Oregon 14.

<sup>49</sup> *Sutcliffe Co. v. Louisville* (1924), 205 Ky. 718.

<sup>50</sup> *State v. Lyrech* (1913), 88 Ohio 71; *Spangler v. Mitchell* (1915), 36 S. D. 335; *Standard Oil Co. v. Lincoln* (1926), 115 Nebraska, 243.

"Times and economic conditions unquestionably will change in the future, and with them the law of public purpose and municipal functions."<sup>51</sup>

"In all this increase of functions the city has not lost, but rather has intensified, its predominantly business character. . . . The characteristic form of action of the municipality is buying things or services for its people—sewers, parks, waterworks, police protection, fire protection, education, *et cetera*. . . . It lays down no broad principles of human conduct nor adopts policies of far reaching consequence, as do our national and state legislatures."<sup>52</sup>

## VII. THE FUTURE OF MUNICIPAL FUNCTIONS

The municipal corporation of the twentieth century can scarcely be compared to its seventeenth century precursor as to either its immediate *raison d'être* or its *modus operandi*. "The twentieth century city," said Zueblin, "is in a class by itself. History furnishes no prototype."<sup>53</sup> It is a new and different phenomenon in both quality and quantity; ideally it is a business without profits and a government without politics. It is a splendid expression of social solidarity and a "noble experiment" in social service. "The principle of individualism," says Anderson, "is a cold and arid thing in the face of living demands for new services. When a health department or woman's club can show how, by the expenditure of a few thousand dollars annually on child welfare clinics and visiting nurses, the infant death rate can be cut fifty per cent, an alderman's individualistic principles would have to be as laws engraved in bronze for him to resist the demands arising for the expenditure."<sup>54</sup> He also says that "The things which we have in common and do in common are multiplying and increasing in importance. From them we gain some of the richest experiences of life. Towards them we have a common responsibility which cannot safely be evaded. It is through these common things that American cities are working, as they see it, to promote the good life for which the state exists. For, as Aristotle says, 'A state exists for the sake of a good life, and not for the sake of life only.'"<sup>55</sup>

<sup>51</sup> Kneier, *op. cit.*, 340 *et seq.*

<sup>52</sup> Reed, *op. cit.*, 42.

<sup>53</sup> Zueblin, *op. cit.*, I.

<sup>54</sup> Anderson, *op. cit.*, 400.

<sup>55</sup> *Ibid.*, 420.

*Cancel*

## CHAPTER XLII

### MUNICIPAL ORGANIZATION

In the realms of government and administration, too, we see the rule in operation that the nature of the work to be done or the result to be achieved controls the type of organization that we adopt. Function, in the long run, determines form. The function is the end; the form is essentially nothing but the means.

—WILLIAM ANDERSON

#### *EXTERNAL ORGANIZATION*

##### I. THE RELATION OF FORM AND FUNCTION

Form is important, and over short periods of time may frequently determine function. The available means necessarily do determine the immediately attainable ends. For example, the chief argument now advanced against municipal ownership and operation of public utilities is that the administrative standards and organization of our municipal corporations are not adequate to meet the highly technical demands of such administration. As a matter of fact almost the whole of American municipal development has been concerned in very large measure with reshaping governmental organization in order that it might efficiently perform those functions which the added congestion of population and the increased complexity of modern life have made necessarily public and governmental in character.

Americans probably have placed more emphasis on the mechanics of organization than have Europeans. This has been particularly true in municipal affairs. Municipal government in any European country is practically stereotyped while in the United States there is considerable diversity of form. In this matter Americans have not chosen to follow the instruction contained in the frequently quoted couplet of Alexander Pope:

For forms of government let fools contest;  
Whate'er is best administer'd is best.

If the form of an organization conditions the effective performance of its functions, then emphasis on form is in part justifiable.



"No one of intelligence who has had even the least administrative experience," says Anderson, "would assert today that the form of government had nothing to do with effectiveness in administration."<sup>1</sup> Form is a means and function is an end. It is in the relation of means to an end that form has its true significance, and to the extent that it facilitates the accomplishment of the desired results it may be properly emphasized. The emphasis placed upon form in the United States has led to considerable experimentation in municipal affairs in an attempt to discover the best form of municipal organization for different types of communities. This, however, could hardly be regarded as a worship of form but rather as a recognition of its subordination to function. A survey of the development of municipal organization in the United States reveals three different types: (1) the mayor-council; (2) the commission, and (3) the city manager.

## II. THE MAYOR-COUNCIL TYPE

In point both of historical precedence and numerical prevalence the mayor-council, or aldermanic, type of municipal government has been the dominant form of civic organization in the United States.<sup>2</sup> There are two forms of this type, depending upon their relative degree of centralization: (1) the weak-mayor and (2) the strong-mayor form.

1. *The weak-mayor form* of aldermanic government developed first. Its outstanding characteristics have been admirably outlined as follows:<sup>3</sup>

(1) The council, a representative, and, therefore, usually rather extensive body, in many cities elected by wards, and sometimes bicameral in organization, controls municipal finances and a number of the administrative departments. It also exercises the ordinance power, subject in some instances to the conditional veto of the mayor.

(2) The mayor is independently elected by the voters. His ap-

<sup>1</sup> William Anderson, *American City Government* (1925), 311.

<sup>2</sup> "No truism has been oftener repeated than that the settlers of the English colonies brought with them ready-made their ideas concerning government and law. . . . In England, at the close of the seventeenth century, there were some two hundred boroughs which might be classed as municipal corporations. . . . The governing body of this corporation was normally a council consisting of the mayor, as president, and two grades of councilors—aldermen and common councilmen."—T. H. Reed, *Municipal Government in the United States* (1926), 45-46.

<sup>3</sup> Anderson, *op. cit.*, 313.

pointive powers usually are highly restricted, though in some instances he has considerable control of certain departments, such as police. He exercises restricted legislative powers through his right of recommendation and veto. In some instances he is the presiding officer of the council.

(3) There are usually several elective heads of administrative departments whose powers are specified in the charter and who are subject to control by neither the mayor nor the council in the management of their respective departments.

(4) Several elective or appointive boards generally are to be found. While the nature of their jurisdiction varies from city to city, in general they deal with such matters as police, health, public works, and parks. Oftentimes they are endowed with independent fiscal powers as well as extensive control of their own policies.

The arguments in favor of such a system were its incorporation of the major doctrines of eighteenth century political philosophy. In the first place it was thoroughly in keeping with the principles of decentralization and checks and balances. It followed the federal analogy in providing, originally, at least, for bicameralism. It met the demands of frontier democracy by making most of its officers elective. It was thought that numerous officials and boards would act as a check upon corruption and secure economy in administration since their duties would be so limited as to make it possible for citizens to serve in official capacities without remuneration. It is probably true that during the earlier period of our history the weak-mayor plan worked about as well as any other form would have functioned. Political life was comparatively simple; the extent of municipal activity was restricted almost entirely to the maintenance of peace and good order.

As time advanced, certain weaknesses in this form developed. With the expansion of municipal activity, and the creation of numerous uncorrelated, semi-independent administrative agencies, certain defects become apparent. The appearance of political parties accompanied by the spoils system tended to weaken the principle of checks and balances, to correlate the operation of the multitudinous administrative agencies and to multiply the number of employees in the interest of the machine, thus eliminating the economy expected from decentralization. If the party boss failed to secure the cooperation of the innumerable administrative bodies created to meet the functional expansion of the municipalities, almost complete confusion resulted.<sup>4</sup> For example, "in the State

<sup>4</sup> W. B. Munro, *Municipal Government and Administration* (1923), I, 355.

of New York there were in 1870, in the one small town of West Farms, six special commissions created . . . for the purpose of surveying and laying out a particular thoroughfare, and endowed with the power to contract debts or expend moneys for the town, to a certain amount in most instances, but in several cases without any limitations."<sup>5</sup> The weak-mayor form seemed to result in machine control on the one hand or disintegration on the other, either of which was irresponsible government.

2. *The Strong-Mayor Form.* In an attempt to avoid these consequences, the aldermanic type of government was modified into the strong-mayor, or centralized executive, plan which is found at the present time in many of our larger cities, and, in fact, is prevalent throughout the United States. The salient features of this form may be summarized as follows:<sup>6</sup>

(1) Powers are divided between the mayor and the council; the one is the executive, and the other the legislative agent.

(2) The separation of powers does not strictly follow the line between executive and legislative since the mayor participates in legislation by virtue of his power of recommendation and veto.

(3) The mayor as the chief executive controls the chief departments and is, in most cases, vested with the unreviewable power of appointment and dismissal.

(4) Financial control is vested in the mayor. He prepares and submits the budget, and frequently the council is prohibited from revising it except downward.<sup>7</sup> In many cases the mayor is given the power of absolute veto even of this revisory action.

(5) The council is usually small, although it varies in both size and the basis of its composition. Recent tendencies are in the direction of making it elective at large.

(6) The council is purely a legislative body, its chief functions being the passing of ordinances and resolutions and the approval of bond issues and budgets. Any deviations from this principle are in favor of the mayor. In general, the council is restricted to the approval, modification or rejection of the mayor's proposals.

Without question the centralized executive plan provides a system far better able to cope with the problems facing twentieth century municipalities than the weak-mayor type of local government. Simply stated, it changes the emphasis in municipal government from legislation to administration. It separates the legislative

<sup>5</sup> *Hanlon v. Supervisors of Westchester* (1870), 57 Barb. (N. Y.) 383.

<sup>6</sup> Reed, *op. cit.*, Chs. X-XI; Anderson, *op. cit.*, 316.

<sup>7</sup> Lent D. Upson, *Practice of Municipal Administration* (1926), 57.

and executive departments, and to a limited degree discards the theory of checks and balances. Due to the elimination of numerous elective offices, and the marked extension of the appointive power, it quite measurably shortens the ballot. In the absence of the addition of numerous boards and commissions it assures a fairly simplified and centralized administration. As Brand Whitlock intimated, it strengthens and dignifies the office of mayor and, thereby provides a responsible leadership in municipal affairs.<sup>8</sup> It combines executive initiative and responsibility with reasonably intelligent and effective supervision by the council. On the whole, it is the most effective form that the mayor-council type of city government has assumed and apparently has proved very satisfactory in such cities as Boston, Philadelphia, Detroit, St. Louis, Denver, and Seattle.

However, the plan has certain undesirable features. The subordination of the council and its almost complete elimination from the sphere of administration is perhaps unwise. It removes the careful scrutiny and criticism which is essential to the health of any governmental system. It sometimes develops unfortunate relations between the mayor and council with the result that the council restricts, to the limit of its legislative powers, the actions of the administrative department. As with the weak-mayor plan, a strong boss usually develops behind the scenes to eliminate such friction and ultimately to control municipal affairs in the interest of the machine. Probably its most objectionable feature is that the mayor being popularly elected is required to be an "organization" man in order to provide right of way for the machine and the spoils system.<sup>9</sup> The mayor's control of the administration makes it possible for the spoils system to determine the qualifications of those seeking administrative posts.<sup>10</sup> If the contest for control happens to follow non-partisan lines, the candidate who strikes the public fancy usually wins. "It is far better for the candidate to advocate the five-cent street car fare, and to denounce wealthy corporations, 'big business,' and the 'enemies of the people,' than to speak in the cold hard facts of debts reduced and miles of pavement laid."<sup>11</sup> Whether the election is conducted on a partisan or personal basis, administrative ability is seldom a consideration and

<sup>8</sup> Brand Whitlock, *Forty Years of It* (1916), *passim*.

<sup>9</sup> W. B. Munro, *The Invisible Government* (1928), 28.

<sup>10</sup> Reed, *op. cit.*, 83-99; James Bryce, *American Commonwealth* (New Ed.), *passim*; S. P. Orth, *The Boss and the Machine* (1921), *passim*; and George Vickers, *The Fall of Bossism* (1883), *passim*.

<sup>11</sup> Anderson, *op. cit.*, 318.



the municipality suffers accordingly. Finally, the strong-mayor form places a too heavy responsibility upon the theory of popular control. It assumes an exceedingly high order of intelligence, an infinite patience, and eternal vigilance upon the part of the electorate. In the days of universal suffrage and a highly complicated economic order this assumption is unwarranted. "Men of approved executive ability are rare in municipal politics." Political success is rarely accompanied by administrative ability. The virtues of this plan are, therefore, largely incidental. Its success is almost wholly conditioned upon a popularly elected mayor.<sup>12</sup> It provides possibly more completely for a government of man than any other method of political control found in the United States. The thesis—whether government by man or law—becomes the broad basis of its relative merits and demerits and the subject for its advocates and opponents to debate.

### III. THE COMMISSION TYPE

A third phase of the structural development of municipal government in this country involves some very radical departures from the principles which permeate both strong- and weak-mayor organization.<sup>13</sup> The commission plan has assumed forms of considerable variation, but its general characteristics may be indicated as follows:<sup>14</sup>

(1) There is a complete unification of powers and functions in

<sup>12</sup> See C. H. Titus, "Voting in California Cities, 1900-1925," 7 *Southwestern Soc. and Pol. Sci. Quar.*, 383 (1925).

<sup>13</sup> The commission plan probably started in New Orleans in 1870. It was not copied, however, due possibly in part to its being a "carpetbagger" institution. Its modern use dates from the reorganization of the government of Galveston, Texas, after the disastrous flood of 1900. The aldermanic government was unable to cope with the situation, and the "Deep Water Committee," a body which had been working on harbor improvements, took charge. The plan as originated provided for government by a commission of five to be appointed in part by the governor. In *Ex parte Lewis* this appointive feature was declared unconstitutional, and all the commissioners became elective, according to the statute of 1903. This plan was adopted by Des Moines in 1907, and since that time has spread rapidly. In recent years, however, its expansion has declined, and it seems to be consistently losing ground to the city-manager plan. Reed, *op. cit.*, 196-197.

<sup>14</sup> Anderson, *op. cit.*, 321. A standard work on the commission plan is C. R. Woodruff (editor), *City Government by Commission* (1911); T. L. Chang, *History and Analysis of the Commission and City-Manager Plans of Municipal Government* (1918); W. B. Munro, "Ten Years of Commission Government," 1 *Nat'l. Mun. Rev.*, 562-568; F. H. MacGregor, *City Government by Commission* (1911), *passim*.

a single body. The doctrine of separation of powers and checks and balances is theoretically discarded.

(2) Politics and administration or legislation and execution are vested in an elective commission.

(3) The commission consists usually of five or seven members.

(4) The commission is both collectively and individually responsible. As a commission it constitutes the legislative body of the municipality. Individually, its members are the administrative heads of their respective departments.

(5) The mayor is one of the commissioners and may be elected by the voters as mayor or be chosen by the commissioners from among their own number. Like the British prime minister, he is simply *primus inter pares*. He is the presiding officer of the commission and titular head of the city. He usually has no veto over the acts of the commission.

(6) The members of the commission are usually elected at large on a non-partisan ballot.

(7) The commissioners act as the administrative heads of departments, and are, therefore, expected to serve full time and receive proper compensation.

(8) Since the traditional inter-divisional system of checks and balances is discarded, the initiative, referendum, and recall are usually provided as a system of control.

The commission type of city government has some outstanding merits. The simplification of the machinery of municipal government promotes the understanding of its workings by the citizen and as a result increases his interest in municipal affairs. It materially shortens the ballot and thus simplifies the problem of the voter. Election at large partly eliminated log-rolling which generally results from a system of ward elections. The complete unification of powers and functions closely associates legislation and administration and makes it more difficult for administrative officials to evade their responsibilities. It makes possible in many instances a certain amount of intra-functional centralization by combining departments and bureaus and thus achieves a degree of economy by a reduction in personnel.<sup>15</sup>

There seem to be, however, certain defects inherent in the structural arrangement of this plan. Anderson notes that it provides no machinery whereby the programs and activities of the different

<sup>15</sup> As several authorities have indicated the magic number five has been considerably overemphasized, with the result that many larger cities are suffering from a lack of administrative machinery.

departments may be criticized by those familiar with governmental affairs.<sup>16</sup> It is true enough that the great load of detail imposed upon each commissioner in his administrative capacity makes most sessions of the commission nothing more than a formal approval of the policies of the individual members with reference to their particular departments, and that the familiar rule of "senatorial courtesy" prevails. More important, however, have been the difficulties arising in connection with fiscal matters, particularly with reference to the budget. Under commission government the budget usually represents a compilation of departmental estimates scaled down to meet the anticipated revenue. It lacks entirely the essential characteristic of a workable budget—a program of correlated activity. In some instances a separate budgetary agency has been created, but due to the fact that it usually has been attached to some department, or placed under the control of one or all of the commissioners, its accomplishments have been negligible.

The failure of the plan to make any distinction between politics and administration has also been made an object of criticism.<sup>17</sup> As in the strong-mayor plan, popular success is, in most cases, not a guarantee of administrative efficiency. While it is true that under the commission plan no one of the commissioners has the opportunity to build a strong personal machine such as that to which the strong-mayor type readily lends itself, the fact remains that neither does it assure the election of a skilled administrator any more than does the centralized executive plan.<sup>18</sup> In short, the plan places a premium upon political activity, party loyalty and service, and personal popularity, rather than upon technical efficiency, in filling the administrative posts.

Again, while the plan makes noteworthy steps in the direction of the centralization of responsibility, it must be mentioned that the responsibility is distributed among five men rather than centered in one.<sup>19</sup> While in theory responsibility under the commission plan is duplicated—on the one hand to the commission collectively, and on the other to the voters—in practice the active responsibility of the commissioner to either group is, for the reasons indicated, very slight indeed. The commissioners rarely question or oppose the proposals of their colleagues, and the public is rather

<sup>16</sup> Anderson, *op. cit.*, 322.

<sup>17</sup> Reed, *op. cit.*, 214.

<sup>18</sup> *Ibid.*, 216.

<sup>19</sup> Munro, *Municipal Government and Administration*, I, 411.

noted for slumbering on its rights.<sup>20</sup> Although there may be wide variations in the relative efficiency of the different departments of government, there is no one, under the commission plan, to whom responsibility for its administration can be assigned. It is in fact a plural executive type and on its legislative side really has as many houses as there are commissioners. The fact that the voter is not in position to pass upon problems of departmental detail renders popular control ineffective if not impossible. The development of twilight zone functions, difficult of classification, also presents a problem of considerable importance. If such functions are annexed by particular departments it may mean that expenditures for regular activities will be proportionately curtailed.

A further objection which has been directed against commission government is that the commission has been vested with legislative, and, therefore, representative, functions but at the same time deprived of its representative character. The smallness of the commission and the general practice of electing it at large lends added emphasis to this objection. But either to increase the commission or to elect it from wards would be an unwarranted violation of the theory of the plan itself.

The most apparent tendency of municipal government at the present time is the assumption, on the part of the municipality, of extensive corporate functions, demanding the complete professionalization of the municipal services and the highest degree of concentration of responsibility. Commission government has neither unified the administration, nor placed it upon a professional and permanent basis. It has not exploited the possibilities of either the merit system or scientific fiscal procedure. It has failed to establish centralized responsibility, and, because of its inherent character, seems unable to do so. In this infirmity is to be found the chief explanation of its failure.

#### IV. THE CITY-MANAGER TYPE

The most recent development in the structural organization of municipal government is the controlled executive plan—the city-manager form.<sup>21</sup> The commission plan was in fact the physical

<sup>20</sup> Reed, *op. cit.*, 217.

<sup>21</sup> The city manager plan originated at Staunton, Virginia, in 1907. The first important city to adopt it was Dayton, Ohio, after the flood of 1913. The subsequent spread of the manager plan has been very rapid, and down to the end of 1927 increasingly so. The figures of the International City Managers Association for 1929 show that 401 cities in the United



progenitor of council-manager government, though the two plans actually represent totally divergent theories of governmental organization and operation. However, the emphasis of business methods and structural arrangement, together with the presence of the director-like commission, undoubtedly suggested the completion of the analogy between the administration of municipal and private corporations—the employment of a distinct executive authority with technical qualifications, working under the direction and control of the council. The outstanding characteristics of the plan may be outlined as follows: <sup>22</sup>

(1) All legislative and administrative powers are vested in the hands of a comparatively small, usually popularly elected directorate. There is no separation of powers, no veto, and no important system of checks and balances.

(2) There is, however, a distinct separation of functions. The activities of the council are restricted to legislation and administrative supervision. The actual work of administration is performed by an appointive, presumably technically skilled city manager, and department heads appointed by him.

(3) The council is supposedly as small as its representative character will allow. Consequently, the short ballot is a feature of the manager plan.

(4) The city manager, selected by the council on the basis of training and ability, has the unreviewable appointive power of the heads of departments and their subordinates, prepares the budget, and has complete control of actual administration.

(5) The council controls the manager through its power of appointment and dismissal, its unreviewable ordinance power, its ultimate control of municipal finance, and its supervisory and investigatory powers. "In my opinion," said Hatton, "the greatest problem that confronts modern political democracy on the struc-

States have at present some sort of manager government. Among the larger cities adopting the plan have been Cincinnati, Cleveland, Fort Worth, Grand Rapids, Kansas City, Miami, Portland, Me., Rochester, Sacramento, and Wichita. The plan has been chiefly confined to the cities of moderate and comparatively small populations. It is now authorized by law in over two-thirds of the states. Practically all new charter adoptions are providing for some variation of this form of government, and its gains have been made at the expense of both aldermanic and commission government. Very few cities have abandoned commission government, and in those instances where it has failed, Reed is of the opinion that the facts cannot be construed into a popular repudiation of the plan. See Reed, *op. cit.*, Ch. XIII.

<sup>22</sup> See Anderson, *op. cit.*, 326-327; Reed, *op. cit.*, 225-226; Chester C. Maxey, *An Outline of Municipal Government* (1925), 50-52.

tural side, particularly in the United States, is the creation of an efficient executive subject to constant popular control.”<sup>23</sup> This control can be exercised only through representatives.

(6) In an attempt to place the administration on a permanent, professional basis, the manager and his subordinates are usually given indefinite tenure, subject only to removal by the appointing authority; the manager by the commission and the subordinates by the manager.

The unification of powers and the separation of functions marks a very distinctive development in the theory and practice of local government. The haphazard and uncertain separation of powers and functions under the weak-mayor plan, and the results of its practical operation, indicated the need of some sort of centralization. The inertia which resulted in many instances from the attempted separation of functions under the strong-mayor plan served to lend added weight to the arguments for central control. While the commission government effected complete unity of powers and functions, it failed to centralize budget making and administration and hence to accomplish satisfactory results. Recognizing the fundamental differences between legislation and administration, the manager plan makes provision for the separation of these functions, vesting each where it will be most efficiently performed. “There is a radical distinction between controlling the business of government and actually doing it. The same person or body may be able to control everything, but it cannot possibly do everything; and in many cases the control over everything will be more perfect the less it attempts personally to do.”<sup>24</sup> The council is a legislative and directory body, representing the citizens of the municipality. The administration, if the plan is popularly operated, is in the hands of a trained, skilled executive who aids the council in formulating legislative policies and executes them under its direction and control. With reference to administrative detail, concerning which the legislative body cannot fully be informed, the manager exercises complete jurisdiction. This distinction—the centralization of powers but the separation of functions—is the very essence of manager government. The council may discharge the manager, but it cannot or should not dictate concerning the details of administration.<sup>25</sup> In the field of legislation or the forma-

<sup>23</sup> Quoted by Leonard D. White, *The City Manager* (1927), 232.

<sup>24</sup> J. S. Mill, *Representative Government*, Ch. V.

<sup>25</sup> H. M. Waite, “The Legislative Body in City-Manager Government,” 12 *Nat'l. Mun. Rev.*, 66 (1923).

tion of policy the manager is impotent, except in a purely advisory capacity. "But," says Anderson, "the plan goes even further than this. It not only permits the separation of the political from the administrative branch of the government, while retaining complete unity of control and direction in the hands of the political branch, but to the council which honestly tries to live up to the spirit of the plan it gives advantages not possessed by city councils under any other form of city government in existence in America. It gives the council the right to choose as city-manager the most able and experienced administrator to be found in the country at the salary it can afford to pay. It stresses the expert and professional phases of municipal administration, giving the manager himself every inducement to hire competent department heads. It gives the council the right of constant contact with the manager and his chief subordinates at council meetings, where the manager, and also usually the department heads must be in attendance to give advice, to answer questions, and to meet criticism."<sup>26</sup> This creates a government of experts controlled by elected laymen.

The theory of the manager plan has been attacked as undemocratic, and, therefore, un-American. This attitude is resultant, in very large measure, from the failure to understand that real democracy consists not so much in the popular election of all public officers as in the sensitivity of government to the popular will and the constancy and completeness of popular control over it. It seems actually to be far more democratic to have the responsibility for the performance of administrative functions vested in an employee whom the council, the representatives of the people, may at any time discharge, than to have one directly responsible to the people at infrequent intervals. As a matter of fact, the city-manager is far less of a potential autocrat than the chief executive under the strong-mayor plan of government. The fact is that under the manager plan, the responsibility of the manager is actual while under the strong-mayor plan the responsibility of the mayor is only theoretical. This is true because the council or commission under the manager plan is able to control the manager. The council is usually a very able body because its members serve without pay. They are generally successful business and professional men who are willing to give some of their time to public affairs. The manager plan makes it possible for them to do this without having to retire from their business or professions.

There is a somewhat more valid objection in the contention that

<sup>26</sup> Anderson, *op. cit.*, 331.

the plan fails to supply the people with political leadership.<sup>27</sup> The very essence of the manager plan is destroyed if the manager is permitted to pose as a popular leader or to play a political game behind the scene with a view of controlling the commission. There is no place for a peripatetic prince in the manager plan. American communities, according to Munro, demand political leadership of some sort.<sup>28</sup> Probably the most commonly attempted solution of this problem has been the retention of the office of mayor, and the designation of its incumbent as the titular head of the city and of the political department. "It is highly probable," says Reed, "that such a dualism would result, if the manager were not completely subordinated to the mayor, only in destructive friction."<sup>29</sup> A strong mayor superimposed upon the manager plan practically converts it into the strong mayor type. After all is politics a major consideration in municipal affairs? Is it political leadership or business sense that is needed in city government? Can we hope except by accident to secure business ability through political leadership? If the manager provides the former why overtop him by a political boss who under the disguise of a mandate from the plain people will always be able to find sufficient excuse to accomplish his own purposes? A careful analysis of the mystical popular will generally reduces it to the will of the machine. It seems much more reasonable and desirable to secure the necessary popular leadership and control through the commission than by means of some unarticulated contrivance to remedy a doubtful deficiency. If such device is a mere matter of legal fiction, it is useless; if it meets the requirements of real leadership, then it becomes the man-

<sup>27</sup> "To me," says Gulick, "the most important single failing of city manager form of government is the lack of political leadership. It is human nature for the voters to demand some one individual to stand up as their political leader and public educator on matters of municipal concern. Take any of the cities that have recently been involved in traction or public utility disputes. There must be some one man in the community who not only can talk for the public, but can help them see their way out of the morass. The man who does this is generally the mayor. If a city manager undertakes to do the job, he gets into politics and is thrown out later. If the city manager does not do it, then some member of the city council, perhaps the so-called mayor, must undertake the job though he is not expected to give much time to city work as a rule and is not well acquainted with the administrative side of the government which is generally of importance in most of the city's governmental problems." Quoted by W. P. Capes, *The Modern City and Its Government* (1922), 172, footnote.

<sup>28</sup> W. B. Munro, *The Government of American Cities* (4th Ed., 1926), 338; see also the same author's *Personality in Politics* (1924), 79-114.

<sup>29</sup> Reed, *op. cit.*, 228.



ager and subverts the system.<sup>30</sup> A political boss in charge of the manager plan would destroy the effectiveness of not only the manager but also the commission. Who would want to be a commissioner under such a system? A strong commission as well as an able manager is a *sine qua non* of the manager-council type. It is either this arrangement or the strong-mayor type in either form or substance. If the substance, why not the form?

The manager plan has also been criticized for its failure to work according to some of its cardinal principles. This criticism overlooks the fact that mechanisms alone regardless of how scientifically they are organized cannot eliminate the human element in government. The same criticism might be made of our national or state governments or of any other form of municipal government. It is claimed that the council has tended to usurp administrative functions. Have Congress and the state legislatures done this? Why so many boards and commissions in national and state governments largely under legislative control? Why so many laws dealing in detail with administrative matters? Of course, legislative exercise of administrative functions is to be deplored, but the doctrine of separation of powers in our national and state systems has been unable to prevent it. The solution of this problem is more a matter of the quality of the legislative agent than of the mechanics of structure. The ability of the city electorate to select a proper commission is possibly the chief factor involved.

It is further observed that the average length of service of a manager is slightly less than three years. It should be mentioned in this connection that the problem of tenure is essentially one of compensation. There can be no doubt that managers, except in the larger cities, are underpaid, and even there their earnings are not commensurate with their potential earnings in private enterprise. Municipal corporations must pay as well as private enterprise if they expect to secure and retain competent administrators. Municipal government must be regarded as business rather than as politics. Inferior and short-life managers are, therefore, more a matter of attitude of mind than of inherent defects of the manager plan. Its merits must be judged on a basis of results in comparison with those accomplished by other forms of municipal government rather than according to any set of absolute standards.

What have been the results achieved by the managerial type of city government where it has been honestly tried? According to Munro, a generally recognized authority on municipal affairs, they

<sup>30</sup> White, *op. cit.*, 226.

have been <sup>31</sup> (1) expertness in administration, (2) improved methods in municipal finance, (3) expansion in municipal services without an appreciable increase in cost, and (4) a more efficient type of service. "The managers," says White, "have been successful in maintaining praiseworthy standards of administration. In most cities they have greatly reduced the influence of politics. They have secured adequate interest rates on public funds. They have purchased to advantage without too much consideration of the local merchants. They have planned intelligently and executed efficiently." <sup>32</sup> It has achieved certain other results less tangible and immediate in character but undoubtedly in the long run more important. It is educating the American people to an appreciation of a non-partisan administration of municipal affairs. The professionalization of government service by the elimination of the spoils system is a prerequisite to the efficient management of public affairs and is a reform in which comparatively little progress has been made in municipal government. Managers are generally in favor of applying the merit principle to municipal affairs.

The manager system fully embodies the modern conception of integrated consolidated administrative power and in this respect furnishes the formula for the reconstruction of state and national administrations. Business men and taxpayers are not satisfied with the extravagant and haphazard administration of the politician. The Director of the Budget Bureau of the national government and the centralized executive budget systems of the most scientifically reconstructed state governments are demonstrating that executive leadership in financial matters may be as effective in national and state as in municipal affairs.

The economies effected by the manager system have generally been used for the improvement and expansion of services. Economy in municipal government is not so much a matter of cost of service. Cutting the social service side of municipal government below a proper limit and standard results in a reduction of the city budget but in a very doubtful economy. It is undoubtedly true though possibly not evident to many that there can be no material retrenchment in the cost of municipal government except in the expenditures for social welfare. <sup>33</sup>

Finally, the degree to which the controlled executive is left free from political domination will largely determine the extent to

<sup>31</sup> *Government of American Cities* (4th Ed., 1926), 330-331.

<sup>32</sup> White, *op. cit.*, 291.

<sup>33</sup> H. L. Lutz, *Public Finance* (1924), 80.

which it will be able to professionalize and scientifically administer municipal service. This, in turn, depends very largely upon the vigilance of the electorate. Manager government is not a fool-proof machine. It "will not automatically produce good works, but must depend for its success upon the character of those entrusted with operating it. As in the case of all democratic institutions, the burden of responsibility rests ultimately upon the electorate."<sup>34</sup> "The city-manager plan of municipal government is not the only one for reaching the end in view," says Lowell, "but it is the best that has yet been proposed for American cities, and the one most in harmony with the spirit of our institutions."<sup>35</sup>

### INTERNAL ORGANIZATION

#### I. SINGLE EXECUTIVE *v.* BOARDS

As a result of the phenomenal expansion of municipal functions in the United States, municipal councils and commissions have been prone to delegate, in a very considerable degree, the more technical aspects of administrative planning to boards, commissions, and subordinate bodies.<sup>36</sup> This represents to a certain extent the revival of some of the underlying principles of the old aldermanic type of government. It was hoped that a system of board administration would give to municipal projects a more permanent policy, that it would be free from the more sinister political influences, and that it would be able to gauge with greater accuracy public sentiment and opinion with reference to the conduct of municipal affairs. The arguments for the board system are about the same as those for independent administrative departments. "They stress the value of the boards for the making of policies and 'planning the work' rather than for administration, which is 'working the plan.'"<sup>37</sup> But the necessity for coördination, even in the planning of municipal activities, implies a complete and constant subservience of the board to the council, and invalidates the argument that the independence of boards will attract public-minded citizens to municipal service. Also, the fact that the major portion of municipal legislation is effected by the charter commission and the state legislature renders comparatively unimpor-

<sup>34</sup> Reed, *op. cit.*, 243.

<sup>35</sup> Quoted by W. B. Munro, *Government of the United States* (Rev. Ed., 1927), 598.

<sup>36</sup> Anderson, *op. cit.*, 444.

<sup>37</sup> *Ibid.*, 448.

tant the legislative phases of counciliar functions, and eliminates the necessity for any very extensive delegation of legislative details to subordinate agents. It frequently has been proposed that the service rendered by the citizen board-member, being without compensation, results in an appreciable saving to the community. But boards in municipal government are not only unnecessary for legislative matters but are not desirable for administrative purposes. It is a matter of common practice for boards and commissions to employ administrative agents to effect their purposes. Park superintendents, city librarians, and city-planning engineers are examples. Furthermore, boards representing diverse interests and sections of a city generally favor expansion in municipal services and consequently are spenders rather than savers of city revenues.

Probably the most valid objection to government by boards, however, arises in connection with the administration of the more important corporate enterprises of the municipality. The problems presented in the operation of waterworks and traction projects are possibly less a matter of public policy than of economics and engineering. Even in the administration of such enterprises a board is dependent upon an efficient administrator. It is also likely to purchase supplies and distribute contracts with a view to their political efforts as well as to interfere in purely administrative matters. The latter is more likely if the board has charge of a single municipal activity.<sup>38</sup>

There is also the problem of the centralization of responsibility which the use of the board system aggravates. The hierarchical scheme of organization with a single line of authority is necessary to fix responsibility and secure effective results. Unless every administrative function, whether superior or subordinate, is the appointed duty of a designated individual, effective control is impossible. Boards may be used to some advantage in the administration of schools and public utilities as a means of preventing abuses. They are, however, of doubtful value as administrative agents if they are allowed to intervene between a head of department and the mayor or manager since such action almost invariably introduces politics and destroys responsibility. An advisory board of citizens may temporarily be useful in the planning and construction of parks and boulevards. Boards are useful as advisory, legislative, or judicial agents, but experience indicates that as executive agents they are clumsy and irresponsible and lack vigor and expedition.

<sup>38</sup> Upson, *op. cit.*, 10; Reed, *op. cit.*, 310; Anderson, *op. cit.*, 447.



## II. INTER- AND INTRA-DEPARTMENTAL REORGANIZATION

The extension and diversification of municipal activities, together with the increasingly organic character of municipal affairs, have led to some very delicate and difficult problems in the internal organization of administrative departments. Under the older plans of departmental organization, the purpose of the activity of a department was the basis of classification rather than the character of the work performed. Thus, every department necessarily maintained its own fiscal bureau, clerical organization, and many other services extraneous to its main purpose. As a result, correlated and comprehensive records of the activities of municipal government were not kept, and responsibility was diffused.

For many years private corporations have known that the most efficient form of organization was based upon the nature of the work. Upon this basis the activities of municipalities fall into two general classes, line and staff.<sup>39</sup> The line activities include the primary functions for the performance of which municipalities are incorporated such as the preservation of the peace, fire protection, education, health, administration, and street construction and maintenance. There are other functions whose performance is necessary for the effective execution of the line activities such as keeping records, handling moneys, or bringing lawsuits. These are staff activities and are not the primary reasons for the existence of municipal corporations.

The organization of municipal departments according to the line-staff principle has had several important results. It has eliminated interdepartmental duplication of functions, encouraged the development of interdepartmental professionalism, and contributed to specialization in services. Moreover, it has facilitated the placement of responsibility, the organization of unified departments upon a functional basis, and in general given a coherence to the whole municipal program. And through this concentration of responsibility and professionalization of the municipal service it has contributed to the efficient operation of city government.

The reorganization of municipal government has been accompanied by other influences calculated to improve municipal administration. Possibly the most important of these influences has been the introduction of the merit system into municipal civil service.<sup>40</sup>

<sup>39</sup> Anderson, *op. cit.*, 432 *et seq.*

<sup>40</sup> For a discussion of municipal civil service see Ch. XLIII.

The shortening of the municipal ballot was a necessary part of the centralizing of municipal administration. Within the services themselves has developed a pronounced *esprit de corps* as a result of the organization of municipal employees into various associations for their professional advancement. Among the groups that have organized as separate associations or as parts of other organizations are city managers, city attorneys, city planners, and city engineers. Finally, the development of bureaus of municipal research and of training courses in municipal administration in our larger universities has improved the professional tone of the municipal service.

While the idea of the organization of municipal employees for the purpose of collective bargaining is rather repellant to the average citizen, there is probably something to be said in behalf of organization for this purpose as well as for the collection and distribution of information. The public is by no means always a model employer. "While in most cases government employees are willing to forego the right to strike, they do insist with increasing vehemence upon their right to organize and to use all possible legitimate means other than the strike to bring their case before the public and the government."<sup>41</sup> There is no reason why organizations for collective bargaining might not produce a responsible attitude on the part of their members as has been the case with the guild and union system of European countries. After all the problem is not so much a matter of theory as of efficiency and common sense.

#### GOVERNMENT OF METROPOLITAN AREAS

One of the most pressing problems confronting the larger cities of the United States at the present time is the correlation of their organization and activities with those of other political units found within the metropolitan area. New York has about five and a quarter millions of people within the boundaries of the corporation, but there are considerably more than seven and a half millions living in the metropolitan district. Chicago has over two and a half millions in the city and three quarters of a million more in the metropolitan area. Boston has about three quarters of a million in the corporation and a million more in the metropolitan area. Pittsburgh has a half million population, but there are over a million and a quarter in the metropolitan district. Pittsburgh

<sup>41</sup> Anderson, *op. cit.*, 490.

has sixty-eight boroughs in the metropolitan area in addition to the central corporation itself.<sup>42</sup> The complexity of this problem and the conflict of interests involved in its solution have been well characterized as follows: "For social and economic purposes the city is still one, but for politics and government it is a house divided. One city may be the harboring place for criminals who ply their law-breaking trades in another. In one municipality the regulations governing the fire-safety and sanitation of homes may be so lax as to create grave fire and health risks in the neighboring communities. Conflagrations and smallpox, bootleggers and burglars, care little for municipal boundary lines. The problems of local transportation, city planning, sanitation, police, water supply, and many others need to be handled from the metropolitan point of view. The question of how to bring this about in the face of vested local political interests and popular prejudice is a problem of considerable difficulty."<sup>43</sup>

The most obvious solution is, of course, the outright annexation of the outlying area to the central corporation. This solution involves certain difficulties and may in some instances be of doubtful value. As a rule the outlying communities have developed civic pride and a personality which incorporation and submergence with a large city would likely destroy. Furthermore, such incorporation places the control of revenue of the outlying districts under the central area and does not necessarily mean better service for such districts. "A metropolis," says Reed, "is not an assemblage of individuals so much as a collection of communities in which individuals already are assembled. Any sound solution of the metropolitan problem must take into account this fact. Political scientists have long realized the error of ignoring the spontaneous emotional responses of the people, however irrational those responses may appear."<sup>44</sup> Realizing the fundamental accuracy of this statement, most attempts at consolidation have, in some degree, attempted to preserve for certain purposes the historic and pre-existing units, in the form of election districts or administrative areas. The results of this may vary from practical municipal federalism to actual annexation and control, depending upon the importance of the powers vested in the historic corporations.

The creation of metropolitan districts for the performance of

<sup>42</sup> Reed, *op. cit.*, 337, note 1.

<sup>43</sup> Anderson, *op. cit.*, 97.

<sup>44</sup> Reed, *op. cit.*, 339.

specific functions has also been utilized as an attempted solution. The Chicago Sanitary District is of this sort. Such a district becomes a super-government over the existing municipalities for the specific purposes of its creation, while the existing communities are, in turn, deprived of those functions. Any other plan of metropolitan government and administration is simply an adaptation of one or more of the three principles: (1) incorporation, (2) municipal federalism, and (3) metropolitan districts. The English Municipal Corporations Act of 1834 is the outstanding example of the first type of solution—direct annexation. The second type may range from municipal centralization, as in Paris and New York, to a loose sort of municipal federalism, as in Greater London, depending entirely upon the amount of autonomy preserved in the component areas of the metropolitan district. The third type is also subject to considerable variation. The Boston Metropolitan District is governed by a commission of five members, appointed by the governor, and exercises jurisdiction over sewerage, water supply, and city planning for the entire area. The Chicago Sanitary District is governed by nine commissioners elected at large, and exercises jurisdiction over sewage disposal, dock construction, and the development of electrical power.

The problem of the government of metropolitan communities is first of all a practical one. Its solution should be determined entirely by considerations of public policy and administrative convenience and efficiency. The latter can never be sacrificed to the former. Pestilence and disease, murder, robbery, and conflagration must be fearlessly controlled regardless of local sentiment or group interests. These are matters which cannot be safely trusted to the control of local areas and, therefore, should be placed under the jurisdiction of a metropolitan agency. However, sufficient autonomy of the local communities should be provided to maintain their loyalty, pride, and vigor. Any governmental unit or agent will suffer a natural death unless it has some important functions to perform.

Throughout the evolution of our municipal institutions in the United States, certain well-defined tendencies are observed. The first of these is the centralization of responsibility, perhaps best exemplified in the development of strong-mayor government. The second is the concentration of power which is a necessary corollary of the first and a feature clearly incorporated in commission and city-manager government. The third is the separation of functions, in the accomplishment of which the city-manager plan



stands alone. Finally, and somewhat concurrently with the two last-named tendencies is the movement toward the professionalization of the municipal service. These developments are not accidental; our municipal institutions are not pawns on the chess board of circumstance. The evolution of municipal government is to be explained as a phenomenon concurrent with, and largely caused by, the expansion of municipal functions. Function has tended to control form and for this reason there can never be an ultimate form of municipal government. Variation in functions must dictate changes in structure. Contemporary considerations must control the future of both function and form. The challenge of the future lies not so much in the direction of formulating fine-spun theories of municipal powers, functions, or structure, as in seeing that our institutions of local administration are efficient in the performance of their assigned functions, keeping in mind that function is the end and form is the means. But because form is so intimately articulated with function, the structural aspects of our municipal institutions should receive constant and intelligent consideration.

## CHAPTER XLIII

### MUNICIPAL ADMINISTRATION

Administrer, c'est gouverner; gouverner, c'est régner; tout se réduit là.<sup>1</sup>

—MIRABEAU

#### *THE IMPORTANCE OF MUNICIPAL ADMINISTRATION*

Administration is a more technical matter in municipal affairs than in either national or state matters because municipal government is primarily business rather than politics. It also occupies a relatively larger place in the general scheme of things in the municipal field. Its scope, personnel, expense, and the character of its services entitle it to primary consideration in devising a form of municipal control. "Let no one think that the importance of administration can be overrated. As one step in the process of government, administration is part of a chain which can be no stronger than its weakest link. But administration is more than a single step. It is the final stage in the process of delivering actual services to the people, and as such is a continuing or repeated series of acts. The council by its original ordinance creating a service and by its annual appropriations to the service, gives the impulse which keeps the work going on; but it is the administration which actually does the work year in and year out. It is administration which consumes by far the greatest part of a city's budget."<sup>2</sup> The significance of municipal administration in comparison with municipal elections and the work of councils and courts is made impressive by a consideration of the budgetary provisions for salaries, supplies, materials, machinery, and buildings for administrative purposes. Thousands of administrative employees spend from thirty-five to fifty hours a week each in the city's service as compared to ten or twelve hours a week given by a few councilmen and judges. Furthermore, the responsi-

<sup>1</sup> "To administer is to govern; to govern is to reign; they all amount to the same."

<sup>2</sup> William Anderson, *American City Government* (1925), 425.

bility of the administrative force is far greater. A dislocation or a breakdown in any phase of city administration, whether in connection with police, fire, water, light, or sewage service immediately affects the entire population of the city.

### LINE ACTIVITIES

Those services of municipal administration which directly touch the people are according to a recent tendency in municipal organization called line activities.<sup>3</sup> They include the major purposes for which city governments exist and may be conveniently grouped for purposes of discussion into I. Protective and Social Control, II. Public Utilities, and III. Educational Services.<sup>4</sup>

#### I. PROTECTIVE AND SOCIAL CONTROL

In this field fall such matters as 1. Police, 2. Justice, 3. Fire, 4. Health, 5. Planning and Zoning, and 6. Charities.

1. *Police Administration*. "The popular touchstone of successful municipal government," says Maxey, "is the management of the police department."<sup>5</sup> At the present time the prevalent practice is to have the department of police headed by a single commissioner, preferably a civilian, appointed by the mayor, council, or manager. This is the historical arrangement and its political character is largely responsible for much of the corruption too frequently found in police administration. Immediately subordinate to the commissioner is the chief of police. Generally he is a man who has risen through the ranks, and his function is the administration of the policies formulated by the commissioner. The department is itself divided into two parts, the uniformed force and the detective force. The function of the first group is the prevention of crime through patrolling the streets and the handling of traffic. The detective force is primarily a group of investigators, operating after the commission of the crime. For police administration cities are divided into large districts, or precincts, each under the command of a police captain.<sup>6</sup> This precinct is subdivided into beats, the basic units of police organization. A beat is a given area under the jurisdiction of one patrol-

<sup>3</sup> Anderson, *op. cit.*, 432-441.

<sup>4</sup> Lent D. Upson, *Practice of Municipal Administration* (1926), 8-9.

<sup>5</sup> Chester C. Maxey, *An Outline of Municipal Government* (1925), 158.

<sup>6</sup> Thomas H. Reed, *Municipal Government in the United States* (1926), 310-311.

man, who is responsible for the preservation of order in that area. Beats vary in size according to the congestion and character of the area. At the present time there is a tendency in the larger cities to substitute motor for foot patrol combined with the patrol booth and telephone and signal systems. The usual plan of organizing the patrol is the three platoon system under which a shift of patrolmen is made every eight hours. There is one force on duty, another in reserve, and a third free from service until its shift arrives. The reserve squad is usually not as large as the other two.<sup>7</sup>

Policemen are generally selected from the unskilled laboring class, and are, therefore, as a rule not trained in the technical or legal aspects of their work. The informal method of training policemen by a few hours of practice patrol under the guidance of an older officer supplemented by lay discussions at roll-call proved inadequate and resulted in a movement to establish a professionalized system of law enforcement through the use of the merit system and special police training schools. New York and Berkeley, California, have led the way in providing formal instruction in such subjects as civics, state laws, municipal ordinances, powers and duties of police officials, criminology, anthropology, rules of evidence, and court procedure.<sup>8</sup>

2. *Administration of Justice.* Closely associated with the police department are the municipal courts. They are usually courts of limited jurisdiction, extending only to misdemeanors and comparatively unimportant civil suits. The judge of the corporation court in the United States frequently is elected but occasionally appointed by the council, mayor or manager. The trial procedure in both misdemeanor cases and minor civil suits is informal. A warrant or summons is procured and served, the accused or litigants appear before the court, the judge asks a few questions, and the court renders its decision. There is no jury and no bail unless the municipal court has power to decide misdemeanor cases arising under statutes and common law in which cases the defendant usually has the constitutional right to demand a jury. If the offense is serious the municipal court may act as a preliminary hearing body and hold the offender for higher court either by bail or in jail. The corporation, if the city is one of the litigants, usually

<sup>7</sup> W. B. Munro, *Municipal Government and Administration* (1923), II, 184-205; also Raymond B. Fosdick, *American Police Systems* (1920), Chs. III-IX, and Elmer G. Graper, *American Police Administration* (1921), Chs. I-VIII.

<sup>8</sup> Maxey, *op. cit.*, 163-164.



is represented by a member of the city's legal staff, although his participation is the exception rather than the rule.

Much criticism, probably much of it merited, has in recent years been launched against local institutions of justice. As at present organized, central courts handle all sorts of cases. One proposal is to have divisional courts established to permit one judge to handle only speeding and traffic cases, another domestic relations, and a third small civil claims.<sup>9</sup> That this would expedite and improve local justice cannot be doubted. A much needed recent development has been the provision, in some instances, of minor courts in different sections of the city for the settlement of small controversies—courts in which the litigants represent themselves, and the cost of litigation is negligible.

In the United States in recent years the emphasis of criminal justice has decidedly shifted. Correction of the criminal is being substituted for the punishment of the crime.<sup>10</sup> The purpose of justice is becoming less a matter of collective revenge upon the criminal and more a matter of reconstructing the wreckage of society. The essence of correction at the present time is the adjudication of the case against the accused, not against the act itself; the failure equitably to perform this function has been a strong factor in the partial collapse of law-enforcement in this country, and in the disorganization of our courts.<sup>11</sup> The efforts of judicial reform are being directed toward the securing of individualization of punishment. By means of suspended sentence, parole, probation, segregation of prisoners, and by constructive prison employment and vocational education, as well as by psychiatric and medical study and treatment our modern correctional machinery is accomplishing the reformation of indigents and degenerates.

3. *Fire Protection.* One of the most important functions of municipal administration is fire prevention and fire fighting. It has been estimated that the United States pays an annual toll of 12,000 lives and more than \$5,000,000,000 in property from fire losses.<sup>12</sup> "If all the buildings burned in the United States in any single year were placed side by side they would make an avenue of desolation all the way from Chicago to New York, and at every three-

<sup>9</sup> Herbert Harley, "The Model Municipal Court," 3 *Nat'l. Mun. Rev.*, 57-67 (1914).

<sup>10</sup> M. N. Goodnow, "A New Public Servant—The Municipal Psychopathologist and His Task of Soul Saving," 8 *Nat'l. Mun. Rev.*, 306 (1919).

<sup>11</sup> Harry Olson, "The Proper Organization and Procedure of a Municipal Court," *Proceedings of Am. Pol. Sci. Ass'n.* (1910), 78 *et seq.*

<sup>12</sup> *The American Year Book* (1927), 128.

quarters of a mile someone would be found burned to death.”<sup>13</sup> To eliminate this colossal carelessness and indifference of primarily city residents, a nationwide campaign against fire was inaugurated in 1924 by the National Fire Protection Association by instituting a field service with a view of making the attack upon fire as vigorous and scientific as that launched against hookworm, yellow fever, and tuberculosis by medical science. The association sends skilled fire prevention engineers to cities to coöperate with local fire prevention agencies and civic organizations. It now contains in its membership and on its committees the representatives of more than 145 organizations interested in fire prevention and 4100 public officials, architects, and engineers interested in conservation.<sup>14</sup>

Fire-fighting, like police administration, is always organized upon a semi-military basis.<sup>15</sup> It requires a thoroughly disciplined and a very highly organized force. Cities are subdivided into fire districts, based upon property valuation and land topography. Within these districts there are one or more stations, which house the equipment and serve as dormitories for firemen on duty. The basic fire-fighting unit is the company, consisting of the small group of firemen who man a single piece of equipment. If there are several stations in a district, one of the company captains, or a separate officer, will be designated battalion chief. At the apex of the active organization is the fire chief, to whom battalion chiefs are directly responsible. The administration usually is headed by a civilian commissioner. Occasionally fire and police administration are combined for economic reasons, but separate administration is more desirable if at all possible.<sup>16</sup> Many cities have, in conjunction with their departments of fire protection, established arson squads and fire prevention bureaus. The function of an arson squad is to investigate all fires and if possible to establish motive and proof of the overt act in the event that arson is suspected. Fire prevention bureaus inspect premises for fire hazards, order corrections made, and in some instances perform the functions of the arson squad.

Considerable progress of a mechanical sort has been made in fire-fighting apparatus, the description of which is outside the

<sup>13</sup> W. B. Munro, *Principles and Methods of Municipal Administration* (1916), 319.

<sup>14</sup> E. F. Croker, *Fire Prevention* (1912), Chs. IX-XVII, and Crosby, Fiske, and Forester, *Handbook of Fire Prevention* (7th Ed., 1924), *passim*.

<sup>15</sup> W. B. Munro, *Municipal Government and Administration*, II, 251.

<sup>16</sup> Upson, *op. cit.*, 229.

province of this discussion. The motorization of equipment, the development of light weight pumpers or suburbanites, improved ladder trucks, and complete alarm systems should be mentioned, however.<sup>17</sup>

Fire administration is confronted largely with the same problems of personnel selection and discipline as the department of police, and has been subjected to the same political domination. As with the department of police, however, there is a distinct tendency to assure firemen of permanent tenure and promotion on the basis of merit, and properly to train these guardians of the citizens' property through fire schools and special training. The most approved time service scheme, it seems, is a two-platoon system, each platoon alternating at convenient intervals between a day program and a night schedule. The three-platoon system, which provides for three sets of firemen, each serving only eight hours a day, is really too elaborate and is unnecessarily expensive. The object of the platoon system is to increase the efficiency of the force and provide some home life for its members. It makes the service more attractive and secures a higher type of fireman.

4. *Public Health Service.* Possibly no service of the modern city is more intimately related to the daily life of its residents than the protection of their health. The advance in medical science has in the last half century completely revolutionized the attitude of the public toward health protection. It is no mean task, however, to safeguard the health of a large community.

Since public health administration involves the exercise of quasi-legislative as well as administrative power, it is customary for municipalities to place it in the hands of a board of three or five members, one of whom is frequently required to be a physician. Under this arrangement a public health officer is associated with the board and has charge of the administration of the health regulations. A more recent tendency in the larger cities is to establish departments of health directed by a trained health commissioner. The latter practice is preferable, if finances will permit, because the growth of health legislation by the state has made health administration more a matter of administration and less a matter of municipal ordinances.<sup>18</sup> The health service whether the board or departmental form of organization is used should be under the direction of a full-time, scientifically trained, medical officer properly called the health commissioner. Too frequently

<sup>17</sup> Maxey, *op. cit.*, 176; Upson, *op. cit.*, 230-232.

<sup>18</sup> Munro, *Municipal Government and Administration*, II, 275-276.

this service is used to endow some local practitioner or made into a soft berth for a broken-down physician. The health commissioner should have security of tenure, adequate salary, sufficient and competent help, and proper laboratory facilities.

The scope of his function should be confined to major problems which directly concern the health of the municipality as a whole. His time should not be consumed with matters only incidentally related to health, such as street cleaning and garbage disposal. He might very properly be charged with the correlation of the health activities, supplying personnel, keeping of vital statistics, supervision of the water, milk, and food supplies, direction of public health education, control of communicable diseases, and oversight of hospitals and dispensaries.<sup>19</sup>

Health administration as a municipal activity, in spite of the fact that more or less spasmodic and ineffective attempts have been made for many years in that direction, has only recently come to receive the attention which its preëminent importance merits. In conjunction with municipal educational systems many of our larger cities are accomplishing a great deal toward insuring a healthy and vigorous citizenship. It is a matter of paramount public interest and should receive more serious attention. Most cities advertise themselves as health resorts but frequently on critical examination are found not to merit such recognition.

5. *Planning and Zoning.* "A modern municipality should secure to its citizens those physical improvements that will facilitate transportation, promote comfortable and hygienic living, and further the æsthetic character of the community. Such improvements are not the result of casual individual effort but come from the consistent scientific direction of city growth."<sup>20</sup> The accomplishment of this worthy ideal would require the control of street layout, traffic, platting of subdivisions, parks and playgrounds, local transportation facilities, waterfront development, public buildings, water mains, sewerage, housing, zoning, and landscape and beautification.

The administrative machinery provided for city planning in the United States generally consists of a commission appointed by the mayor or council. Its powers, usually advisory, include the giving of advice to the council and city officers. In some matters its advice is a prerequisite to their action but in others it is subject to the rejection of the council by usually more than a majority

<sup>19</sup> Upson, *op. cit.*, 250.

<sup>20</sup> *Ibid.*, 186.



vote. Its control of improvements is limited by the financial authority of the council.<sup>21</sup>

The task of the planning commission, particularly in our older and more developed municipalities, is exceedingly difficult. Cities can not be properly rebuilt except after a fire or some great disaster. And the hodge-podge of streets, alleys, boulevards, and houses which have been constructed without plan or reason serves often almost hopelessly to complicate their task. But in intelligent planning lies the salvation of our cities of the future, and in scientific reconstruction is to be found the solution of present problems of congestion and overcrowding. Planning commissions, in working with areas already built, can use only the cumbersome and expensive machinery of the law—eminent domain and excess condemnation. But if cities have not been laid out properly they must be rebuilt; time will but make more difficult their reconstruction which must ultimately be made. City planning is one of the most technical and most important phases of municipal administration. The platting of new additions and the reconstruction of old areas should be made according to plans formulated by the commission with the ultimate view of a convenient and beautiful city.

Vitally interrelated with planning is zoning, which, however, is too frequently not considered inseparable from a general scheme to prevent inconvenience and anti-social uses of property by private owners. Zoning simply means the division of a city into districts to be used principally or exclusively for designated purposes such as manufacturing, retail or wholesale trade, residence and civic activities. The establishment of such zones is generally accompanied by certain restrictions as to the character of buildings, set back from street lines, and architectural effects in general with a view to developing and preserving the zones for the purposes for which they were designated. The primary purpose of zoning is not to create a distinctive architecture for various districts but to regulate building in light of the activities of various areas largely according to the traffic capacity of streets<sup>22</sup> and the convenience of business and society.

Zoning like planning faces many difficulties in its application. If it could have been applied in the early stages of city building, districts peculiarly adapted for special purposes could easily have been established. Zoning is largely limited in its practical opera-

<sup>21</sup> F. B. Williams, "The Law of the City Plan," 9 *Nat'l. Mun. Rev.*, 675 (Supplement, 1920).

<sup>22</sup> E. M. Basset, "Zoning," 9 *Nat'l. Mun. Rev.*, 315 (1920).

tions to the opportunities furnished by the natural shifts in business centers and the changes in property values resulting.

Technical and legal difficulties also arise. What should be the height of buildings? What provisions for light and air between buildings should be made? How far should residences be set from the street line? It is also necessary to inspect buildings to see that they are being used in conformity with zoning regulations.<sup>23</sup> Zoning regulations cannot be made retroactive.

The usual administrative machinery for zoning purposes is a commission endowed with only advisory powers. The zoning ordinance is an act of the municipal council in pursuance of state law. A board of adjustment or board of appeals, to mitigate the possible over-rigorousness of the operation of municipal zoning ordinances, is usually provided.

6. *The Administration of Charity.* Strictly speaking the administration of charity unlike that of education is not generally recognized as a municipal function. It still remains largely a matter of private individuals and extra-governmental agencies. The reasons for this situation are that the state and the county have assumed the responsibility for the insane, feeble-minded, blind, deaf and dumb, and the poor, and private philanthropy has been inclined to care for dependent children, vagrants, and the sick.<sup>24</sup> There is also the obvious difficulty of preventing the administration of charity by the municipality from becoming a matter of machine politics. Furthermore, institutional charity requires large sums of money and charity in individual cases is difficult to administer.

Municipal charities in the United States generally consist of two principal types—outdoor relief and institutional services. The first is practical to only a limited extent in American cities and usually assumes the form of direct gifts of food, clothing, and fuel, or free medical attention, and in rare instances a small grant of money. The proper administration of outdoor relief requires an organization of social workers capable of making the necessary investigations involved in handling each case in a scientific manner. Institutional or indoor relief for indigent persons is provided through hospitals, homes for the aged and infirm, day nurseries for dependent and defective children, and institutions for the treatment of inebriates and drug addicts. If hospitals are not maintained at public expense under the administration of city

<sup>23</sup> Maxey, *op. cit.*, 184-190.

<sup>24</sup> Upson, *op. cit.*, 309.

authorities, in many instances contributions are made to private institutions for the relief of indigent persons. Special schools for defective children are sometimes maintained. Also free legal aid to the poor and the helpless is provided in the settlement of small claims and in some instances in criminal matters by means of a public defender. Among this class are constantly arising illegal exactions, difficulties about unpaid wages, and irregularities in regard to the purchase of houses for the adjustment of which legal aid is necessary.<sup>25</sup>

The administration of charities in the larger cities is usually entrusted to a department of charities under the direction of a single commissioner with subordinate deputies to aid him in investigation and selection of worthy cases. While the present tendency is toward departmental organization, the board type of organization is still prevalent in many cities and from the point of view of diversity of opinion has certain advantages over a single-headed department which, however, has the advantage of despatch and efficiency. The community chest is coming to be a normal part of our extra-governmental equipment for the administration of charity.

## II. PUBLIC UTILITIES

Possibly the greatest advance in municipal service has been made in the field of public utilities. Domestic life in modern cities could not be maintained without public provision for supplying city dwellers with water, light, power, sewerage, transportation, and communication. Street railways, telephones, gas, electricity, and water are as necessary to the commerce and industry of a modern city as to domestic life.

1. *Water*. "To the average person, particularly the city dweller, water is a pure sparkling substance, agreeable in taste and adaptable in temperature, to be had by turning a tap in kitchen or bathroom. If one is scientifically minded he further recalls that its principal components are hydrogen and oxygen."<sup>26</sup> But if he is at all æsthetically inclined he does not remember that the refreshing product of the tap was not many days before the rain flowing along some street gutter, or was the surface water from the drainage area of some adjacent lake or river. He does not think of the

<sup>25</sup> R. H. Smith, *Justice and the Poor* (1919), Chs. I-XI; and Roscoe Pound, "The Administration of Justice in the Modern City," 26 *Harv. L. Rev.*, 302-312.

<sup>26</sup> Upson, *op. cit.*, 487.

enormous difficulties of supplying a great city with pure and uncontaminated water, or of the direful results which would be encountered if this service were not supplied.

Municipal provision of the local water supply was one of the first services of private enterprise to become recognized as public and governmental in character. At the present time practically all of the waterworks systems of the more important cities are municipally owned and operated, and far more than three-fourths of the water supplies of all cities. Water administration is usually entrusted to a bureau in the department of public works or to a separate department of the administrative organization. Supervision is most commonly in the hands of a board generally appointed by the mayor or manager, though in the largest cities a single commissioner is used. The tendency is in favor of control by a single commissioner. Actual administrative direction is under the supervision of a trained waterworks engineer with a skilled staff of chemists, bacteriologists, and mechanical and civil engineers. The relation which water supply, purification, and distribution bears to the public health and to the other departments of local administration makes it at once one of the most important features, if not the pivotal one, of public works administration.

The functions of water departments are primarily of an engineering character dealing with such matters as the construction of pumping stations, erection of reservoirs, and the laying of water mains. The purification of water supplies, however, calls for expert bacteriologists or water engineers and the planning and construction of modern filtration plants since the water supply of most cities is a manufactured product. The investment in water plants, the extension of water service, water rates, and minimum charges for water connections are matters of a business character for the successful handling of which expert advice and consideration are necessary.<sup>27</sup>

2. *Light and Power.* The question of public ownership and operation of light and power plants is still a debatable proposition while public provision for water supply is accepted as a matter of course. The majority of cities do not own and operate their power plants but the tendency is toward their municipalization. Where cities have provided their own lighting and power equipment, the administrative organization is, in all essential respects, similar to water administration. It is headed by a commissioner

<sup>27</sup> See W. B. Munro, *Municipal Government and Administration*, II, 155-159.



or by the mayor or manager, whose immediate subordinate is a superintendent, a technically trained electrical engineer. The plant staff consists of engineers, electricians, and mechanics.

Several considerations enter into the determination of the problem of municipalization of light and power plants, the first of which is the importance of public consumption of electricity in street and building illumination. The second is the fact that the supplying of electricity to private consumers is ordinary business competition and raises questions of public policy and legal complications. The third consideration involves evaluation of the comparative results of municipal and private ownership.

Whether a city shall own and operate its light and power plant or follow the policy of public regulation and private ownership is a matter on which experience is still unable to furnish unqualified advice. Conservatives are inclined toward regulation and regard public ownership as not only unnecessary and extravagant but dangerous in policy. To them it is a case of government invasion of a legitimate field of private endeavor. On the other hand, there is an increasing number of people who contend that public regulation has failed and must ultimately be succeeded by public ownership and operation.<sup>28</sup> In final analysis the problem seems to be not so much a matter of policy as of results. Sentiments and traditions are not the proper bases upon which a business matter should be settled. Which system can give the best service for the least money? The answers to this question will vary from city to city and within a single city with the changes in administration. It is not a matter of conservatism or radicalism but of administrative service. If regulation is a failure, it is due to the city administration; if public ownership and operation is not satisfactory, it is traceable to the same source. There are advantages and weaknesses in both the relative proportion of which depends upon the efficiency and integrity of the city administration. It seems reasonable to expect with the increase in efficiency in city administration through experts an expansion in public ownership and operation.<sup>29</sup>

<sup>28</sup> See W. S. Murray, *Government Owned and Controlled Compared With Privately Owned and Regulated Electric Utilities* (1922), *passim*.

<sup>29</sup> The usual arguments: (A) for private ownership: (1) expensiveness and inefficiency of public ownership; (2) public ownership unsound in theory and practice—based on socialism and politics; (3) private ownership secures the advantages of private initiative and economical management—more business in government and less government in business.

(B) for public ownership: (1) service rather than profits; (2) elimination of exploitation of labor and the public; (3) inconsistency between

3. *Sewers and Wastes.* From comparatively primitive times sewer systems have been utilized to remove wastes from public baths, homes, and industrial establishments, as well as the rainfall from public thoroughfares. The science of sewage disposal has developed somewhat recently, however, coincident with the knowledge of the disease carrying capacities of sewage, particularly typhoid fever, with the more general increase in personal cleanliness through the use of baths and indoor toilet facilities, with the extensive industrial use of water, and with paved streets which have facilitated the disposal of rain and snow. Sewage disposal is usually a municipal activity administered by a bureau of the water department in which is included also the collection and disposal of other types of wastes. At the head of the bureau is generally a superintendent who supervises sewage disposal, the collection and disposal of garbage and wastes, and street cleaning. He is usually a man with engineering training, assisted by a corps of technically skilled subordinates organized into planning, educational, and inspection divisions. Street cleaning is usually organized on a functional or geographical basis, or upon a combination of the two, while garbage and waste collection is administered on a basis of geographical districts. The functional method places each activity in charge of a capable supervisor for the entire city while the geographical system fixes responsibility for only a given area with coördination of the various activities assumed. The activities of street cleaning and the collection and disposal of garbage and wastes are not so technically diverse as to prevent their successful management by a single supervisor in a district.<sup>30</sup>

Sewage disposal, street cleaning, and waste disposal are rather indifferently considered by the average citizen until their performance becomes a menace to his health and a nuisance to his community. In reality, the sewerage engineer and the garbage man are far more important to personal health and security in the larger urban areas than the ward politician or even the blue-coated patrolman who regulates the details of our everyday existence. The citizen should coöperate with these agencies by making their burden as light as possible.

4. *Streets and Traffic.* Streets and pavements are inseparably connected with planning, zoning, and traffic regulation. Streets

public and private interests makes public regulation undesirable; (4) elimination of the corrupting influence of private utilities in municipal politics. See Maxey, *op. cit.*, 243-246.

<sup>30</sup> Upson, *op. cit.*, 454.

generally may be classified as industrial, ordinary business and better type residential, less important residential, unpaved thoroughfares, and alleys.<sup>31</sup> The grade of pavement or street surfacing used is determined entirely by traffic requirements. Larger cities generally maintain their own engineering staffs and frequently construct their own pavements. Smaller municipalities, however, continue street construction by contract. Whether the one or the other method of construction is followed depends entirely upon the amount of paving to be done and the comparative efficiency of the local administration. However, a trained engineer for supervisory purposes is a good investment for municipalities engaged in street construction programs.

Probably as a result of lack of forethought in the construction of thoroughfares, many large cities are today confronted with rather acute problems of traffic control. There are four major causes of traffic congestion: first, the concentration of population in small areas, as a result of the construction of tall buildings and the centralization of industrial activities; second, certain undesirable physical characteristics of streets which retard the movement of vehicles and pedestrians; third, the extensive use of automobile transportation, with augmented space requirements per passenger unit carried; fourth, the increased movement of people due to broadened business and recreational interests.<sup>32</sup>

Among the attempted solutions of this problem may be mentioned (1) the segregation of fast and slow moving traffic, (2) the installation of signal systems, (3) the elimination of left-hand turns in congested areas, (4) the restriction of drivers' licenses, and (5) the regulation of parking. Any workable solution demands investigation of particular conditions, and the routing of traffic according to topographical arrangements; indeed, traffic control is rapidly becoming one of the newer sciences. One of the more modern developments is the use of rotarized traffic lights. Signal lamps are placed at four corners of the intersection, and when one is red the rest are green. Traffic on the open street can then go straight, turn to the left, or turn to the right without interfering with other traffic streams. If the traffic problems of the present time have any implications at all, at least one is that streets and traffic routes should in the future be laid out only after thorough investigation by trained city-planners and traffic experts and careful consideration of their recommendations.

<sup>31</sup> W. B. Munro, *Municipal Government and Administration*, II, 102-106.

<sup>32</sup> Upson, *op. cit.*, 343.

## III. FUNCTIONAL SERVICES

The cultural agencies of modern cities are almost as important as those which administer to the needs of the material man. In fact, it is in the educational aspects of urban life that city administration gives the best account of itself. Schools, libraries, museums, and recreational centers are among the more important agencies in this work.

1. *Schools.* An urban school system, properly organized, closely resembles a miniature city-manager plan. Educators substantially are agreed that the legislative authority in school matters should be vested in a board, either appointive or elective at large on a non-partisan basis. Immediately subordinate to the board is the superintendent who is the administrative head of the school system. He is employed by the board, holds office at its pleasure, and is responsible to it for the administration of the schools. He nominates the principals of the various schools and their teachers for the consideration of the board, acts as budgetary officer, and through the principals and other subordinates supervises the administration and instruction in the various units of the system. As with the city manager plan, certain violations of the principle of centralized responsibility are observed, such as board approval of teachers and the appointment of a business manager to handle finances, who is generally independent of the superintendent. The superintendent should be the real as well as the apparent administrative head if responsibility is to be enforced. Responsibility in administrative matters must be accompanied with the final decision in such matters to be effective.<sup>33</sup>

There are divergent theories as to the relation of the school system to the municipal government. One theory regards the city school system as a part of the municipal government and would subject its budget and administration to the review of the city council. In several of the cities having the commission form of government, the school system constitutes one of the regular departments of the government under the direction of an elected commissioner of education, who is really the city superintendent of education. The advocates of this theory claim that it prevents extravagance in school administration and secures a better correlation of the city government and the schools in such matters as city planning, recreation, public health, and the handling of juvenile delinquents.

<sup>33</sup> Reed, *op. cit.*, 322-324; Upson, *op. cit.*, 273.



The opposing theory maintains that the school district should be regarded as an independent unit for school purposes and subject only to the supervision of the state. It is pointed out that in matters of curriculum, textbooks, and qualifications city schools are frequently under state control and that in many instances the boundaries of the school district do not coincide with those of the municipality. Furthermore, the exponents of the independent district system claim that it frees the schools from the corrupting influences of municipal politics.

Educators are generally partisans of the latter theory, though it is true that city schools systems have been remarkably free from municipal politics and that the independent arrangement has not eliminated politics. As politics is further eliminated from municipal administration by the adoption of the city manager system, the arguments in favor of the independent system will become less valid.<sup>34</sup> Regardless of the administrative relations that should exist between education and municipal government, their fundamental connection remains the same as when James Madison said, "Popular government without popular information or the means of acquiring it is the prologue to a farce or a tragedy."<sup>35</sup>

2. *Libraries.* A very important phase of municipal activity in the promotion of education and culture among its citizenship is the establishment and maintenance of public libraries. The administrative organization of libraries is analogous, in all essential respects, to that of educational administration. If the library is not operated under the control and direction of the school board, there is usually an appointive library board which stands at the head of the system. This board employs a chief librarian or superintendent, who, in turn, has charge of administrative details. In conjunction with private foundations organized for public philanthropy along cultural lines, many cities have developed libraries which are the cultural and educational centers of their adult and non-scholastic population. The public library is an aid to a cultured and informed citizenship, and a strong force in the elevation of the intellectual and moral standards of a community.<sup>36</sup>

3. *Recreation and Parks.* Supervised and directed public recreation has become a recognized function of municipal government in this country as a result of our industrialization and urbaniza-

<sup>34</sup> Maxey, *op. cit.*, 289-296.

<sup>35</sup> *Writings of James Madison*, IX, 104 (Hunt Ed.).

<sup>36</sup> Excellent treatises on public library administration are: A. E. Bostwick, *The American Public Library* (1923); J. C. Dana, *Library Primer* (1920), and J. L. Wheeler, *The Library and the Community* (1924).

tion. The administration of recreational activities is headed either by a board, appointed by the municipal council, or by a superintendent directly employed by the council. Since the board employs a superintendent, actual administration is practically the same in both instances. The problem of active administrative organization is however, a more difficult matter. Public recreation falls logically into winter and summer, indoor and outdoor, night and day, adult and juvenile, male and female activities. Along what divisions of these activities may the recreational personnel best be organized? If the division is along the line of sex, the arrangement is in many cases illogical and involves much unnecessary duplication. The same thing might be said of age, although there is admittedly a difference in the problem of conducting an adult social center and supervising the play of children. Probably the principal activities should be the basal units of organization and each branch of the several activities assigned to special supervisors.<sup>37</sup> Under the superintendent would be the directors of the activities in charge of the special supervision. To prevent unnecessary expense and duplication it is considered best to employ full-time directors for only the general and major phases of recreational activities and use part-time employees for the direction or supervision of such special activities as evening and afternoon recreation centers.

The expenditure for recreation should not be regarded as a matter of philanthropy but as an investment in citizenship. It is necessary not only for health but for morals and order. "A proper and adequate program of recreation on the part of a city government means a decreasing of juvenile delinquency, a breaking down of race prejudice, assimilation of the foreigner, education through play, a building up of the health and physique of the people, the development of community spirit and civic pride, and the safeguarding of citizens against harmful commercial amusements."<sup>38</sup>

In this connection the question of parks and playgrounds inevitably presents itself. Most American park areas are ornamental rather than useful. They represent the honest but unintelligent effort of the city to provide ground for recreational purposes. Not infrequently they are totally unavailable for the major portion of the city's inhabitants because of their location. A city should have a park system rather than a park, providing space in several portions of its area for play and recreational purposes.

<sup>37</sup> Upson, *op. cit.*, 306.

<sup>38</sup> *Ibid.*, 295.

These large parks are desirable but only in addition to the smaller park areas. A park is primarily a place for children to romp and play in the daytime, and a place where adults perhaps may enjoy flowers, trees, and quiet in the late afternoon and evening. Isolate if necessary golf courses and golfers, but parks should be accessible.

### STAFF FUNCTIONS

Staff functions are the means for the accomplishment of the line activities. They include such major problems as personnel, finance, legal services, purchasing, transportation, and supervision of public property.

### I. PERSONNEL

It has been estimated that there are probably 3,000,000 employees in government service in the United States, excluding those working under contract, those employed for less than half time, and those serving in military and naval establishments, and that this army of civil servants is paid about \$3,000,000,000 annually. While there are no figures to indicate the distribution of these employees among the various jurisdictions in the United States, undoubtedly the great majority is found in municipal service. The most rapid expansion in civil service has taken place in our cities. Statistics seem to indicate that close to fifty per cent of the budget of our larger cities exclusive of the salaries of teachers and contract work is required to meet pay rolls.<sup>39</sup> In its various ramifications, the personnel problem has become one of the most difficult administrative matters of American municipalities.

The usual provisions for the regulation of the civil service in American cities may be briefly outlined as follows: <sup>40</sup>

(1) A bipartisan or nonpartisan commission usually consisting of three members is established to make the rules for the classified service and to supervise their administration. The commission employs a secretary or a chief examiner who has charge of administrative details.

<sup>39</sup> *The Merit System in Government* (1926), 17. The table of the following cities indicates the percentage of budget that was used for payrolls in 1921:

	<i>Per cent</i>		<i>Per cent</i>		<i>Per cent</i>
Philadelphia	50	Seattle	50	Newark	55
Buffalo	35	Portland	45	Jersey City	39
Milwaukee	55	Dayton	63	Paterson	43

<sup>40</sup> Anderson, *op. cit.*, 456-457.

(2) The classified service generally includes all municipal officers and employees except elective officers, appointive judges and board members, appointive heads of the principal administrative departments, school employees, librarians, and confidential secretaries of certain important officers.

(3) The powers of the commission also extend to the making of subclassifications of the classified service, holding of examinations, appointing day laborers, keeping the eligible list, certifying names to department heads having vacancies, regulating transfers, suspensions and removals, and checking the payroll against the list.

(4) A probationary period of six months is usually required of all appointees, during which they are subject to removal without appeal. Some charters create also a trial board, usually composed of ex-officio members, which exercises jurisdiction over suspensions and removals, and to which employees may appeal if their removal is attempted after the expiration of the probation period. In some instances it is also provided that upon the application of a certain number of citizens, any employee in the classified service may be required to answer charges preferred in the petition.

(5) Provisions prohibiting partisan political activities on the part of the classified service as well as the collection of political assessments from persons in the service are generally a part of the regulations of the merit system.

Other means of increasing the efficiency of the administrative personnel after appointment have been suggested: <sup>41</sup>

(1) Constant re-education of employees through classes in special subjects at local educational institutions or within the service itself.

(2) Provision for the facilitation of transfers of employees from one department to another, according to aptitude and manifest ability, in order to avoid misfits.

(3) Arrangements for transfer of employees seasonally in order to absorb peak-load requirements of departments, which occur at different times during the year.

(4) The careful selection of bureau chiefs and head workers on the basis of administrative ability.

(5) The promotion of welfare work among employees, such as disability compensation.

(6) The promotion of self-government and professionalization

<sup>41</sup> *Ibid.*, 488-489.



in order to develop a sense of responsibility for the work to be done.

(7) The formulation of clear and impartial rules concerning minimum standards, suspension, removal, discipline, and hearing.

(8) Just provision for the retirement of aged and incapacitated employees on liberal pensions.

## II. FINANCE

The financing of the activities of modern cities is a problem of the first magnitude which for our purposes may be divided into: 1. taxation, 2. debt, and 3. budget.

1. *Taxation.* Regardless of the particular theory of taxation to which one adheres, the fact remains that the city must have funds for the performance of those functions which society has imposed upon it; the individual must pay something for the benefits which the municipality confers upon him.

(1) *The Sources of Taxation.* The sources of local revenue may be outlined as follows: (a) property taxes, levied upon realty, and intangible and tangible personalty. This tax is very generally used in spite of the repeated demonstration of its unsoundness and inequitable character; (b) capitation taxes, the returns from which are negligible; (c) taxes upon public service corporations, assessed on realty and equipment, in which event it is a property tax, upon capital stock, mileage, or net or gross earnings; (d) income from municipal trading, such as water charges, electricity charges, and other phases of profitable corporate enterprise; (e) special assessments levied to meet the costs of certain improvement projects; (f) business taxes, which are at present rather uncommon, although recommended by leading economists and taxation experts; (g) unearned increment and special land taxes, with which a few American cities have experimented; (h) miscellaneous or irregular revenues, such as state subventions, gifts, endowments for certain public purposes of which the city is made the administrator; (i) license fees, such as those collected from theatres and automobiles, which source is rapidly passing to the state. Property taxes supply the major portion of municipal revenue and are levied primarily upon lands, improvements, and certain tangible personalty.

(2) *Assessment.* "Taxation is a state function, and the method of selecting local tax assessors and collectors is prescribed by state law. Sometimes these authorities are appointed by state au-

thority; sometimes—too often, in fact—they are elected by the local communities—and sometimes they are appointed by the local city council or the chief executive of the city. There may be either a single assessing authority for each unit of government, or a board of assessors, although the former is more desirable.”<sup>42</sup> Assessment is a highly technical task, involving certain essential elements: (a) assessment at true cash value of both realty and personalty; (b) separation of assessment of lands and improvements; (c) district, block, and lot system of indexing property holdings and office records; (d) preparation and publication of complete land value map; (e) tax map showing metes and bounds of all property in taxing district; (f) adoption of unit-foot as quantity standard; (g) adoption of an approved depth rule and corner influence rule; (h) adoption of a standard building classification, with unit factors of building value; (i) adoption of rules of economic and structural building depreciation; (j) record file of all improvements upon each description; (k) collection of material relative to property values, such as sales, building permits, etc.; (l) for personalty, a personal return form to be filled out by each taxpayer, or assessment by the assessors. After assessments are completed, most cities provide for appeal of valuation to an equalization board, serving to equalize the assessment as between citizens of the same community. In addition, state equalization boards are provided for inter-district equalization.<sup>43</sup>

(3) *Collection.* Tax collections are made usually directly by the city treasurer, a locally elected or appointed official. The methods are those generally used in the collection of debts; payment finally may be forced by foreclosure and forced sale. Among comparatively recent innovations in tax collections have been pre-billing of taxes, facilitated in many instances by the rendition of property for the ensuing year at the time of payment of taxes for the last, the collection of taxes in installments, and the collection of delinquent taxes, made possible not infrequently by the removal of the office from political influence.<sup>44</sup>

2. *Debt.* Inasmuch as municipal revenues are usually no more than adequate to defray operating expenses, municipalities, like individuals, must borrow to meet extraordinary outlays. There arise many difficult questions with reference to municipal indebtedness, chief among which is the legitimacy of borrowing. It is

<sup>42</sup> Upson, *op. cit.*, 79.

<sup>43</sup> H. L. Lutz, *Public Finance* (1924), 343 *et seq.*

<sup>44</sup> Upson, *op. cit.*, 128-129.

generally regarded permissible to borrow to cover a deficit resulting from an unforeseen emergency, but unsound to borrow to cover a regularly recurring deficit which should be met by taxation.<sup>45</sup> It is permissible also to use loans in financing an emergency, such as is caused by a flood or disastrous fire, the cost of which is too great to be met immediately by taxation. The legitimacy of borrowing to enable the municipality to engage in municipal trading depends upon the quality of public management, necessity, and other considerations, but should be regarded strictly as a business proposition. There remains the question of the use of borrowing to finance projects which are of general social advantage but which promise no direct financial return, such as schools and highways. No inflexible rule for borrowing can be laid down. It would be perfectly legitimate for a small city to float a bond issue for the construction of a school building but questionable finance for a large city, having several such schools to build each year, to do the same thing. Each case must be decided upon its particular merits, but a pay-as-you-go policy is desirable except when it clearly retards municipal development.<sup>46</sup>

Bonds are the usual certificates of municipal indebtedness; and generally they are of two types, sinking-fund and serial. The first type is maturable at a definitely stated period, interest being paid between the time of issue and the date of maturity and the principal at maturity. Since most state constitutions prohibit the issuance of bonds without a tax levy adequate to meet the interest and a certain per cent of the principal, the question necessarily arises as to the employment of the accrued funds for the retirement of the debt. Due to the difficulty of safely investing these funds at as high a rate of interest as municipal bonds usually draw, the authorities substantially are agreed that the second type of bond is probably the most satisfactory for municipal purposes. This type is the serial bond, toward the retirement of which the city pays a certain sum plus interest charges each year, thus reducing both interest charges and the principal.<sup>47</sup>

In connection with indebtedness, the practice of refunding must be considered. Briefly defined, refunding is the practice of meeting obligations at maturity by the issuance of different bonds in lieu of debt retirement. It is simply a convenient device for enabling a debtor municipality to arrange new terms with its credi-

<sup>45</sup> Lutz, *op. cit.*, 519 *et seq.*

<sup>46</sup> Upson, *op. cit.*, 117.

<sup>47</sup> Lutz, *op. cit.*, 610.

tors when repayment is impossible or undesirable. This practice lends itself to abuse and may result in prolonging principal payments after the destruction of the object for which the loan was floated, such as a building or road. Refunding should possibly be prohibited except as a means of transition to the serial plan or of relief in case of grave emergency.

3. *Budget*. "In its simplest terms a budget may be deemed to be but a consolidated statement of the estimated revenue and expenditure needs of a government for a fixed period."<sup>48</sup> The fundamental importance of a scientific program of correlated activities and expenditures of a government is now generally recognized in the United States. The essentials of modern budget procedure in municipal administration may be outlined as follows:<sup>49</sup> (1) the submission of estimates to the council or commission by the mayor or city manager prepared under his direction and making provision for his program of services for the city; (2) the correlation of these estimates with available or anticipated revenue; (3) a simple and comprehensive statement of these estimates; (4) the passage of the appropriation ordinance by the council or commission in such terms as will afford a maximum of control with a minimum of handicap upon the administrator. Budget formation should, in the opinion of most authorities, be a duty of the administrative head of the municipality, in collaboration, of course, with his major subordinates, although in commission-governed cities it is a function of the commission, and in many instances of a committee of the council. Centralized responsibility is as desirable in the formation and execution of the budget as in any other phase of municipal activity; and it cannot be accomplished by the formation of the budget by decentralized or non-administrative agencies. There is ordinarily no veto power upon the council's action with reference to the budget, although occasionally the mayor is accorded a modified and restricted revisory veto.

In the administration of the budget the student of municipal government comes face to face with one of the most pressing requirements for the centralization of administration. "Stable finance rests not so much on pious hopes as on making both ends meet."<sup>50</sup> Budgets may as well not be made if they cannot be enforced. Questions of budgetary inelasticity must also be met by giving

<sup>48</sup> W. F. Willoughby, *The Movement for Budgetary Reform in the States* (1918), 175.

<sup>49</sup> Upson, *op. cit.*, 55 *et seq.*

<sup>50</sup> A. E. Buck, *Municipal Finance* (1926), 32.



administrators the power to transfer funds from one department to another when necessity requires. This may be done by a specific grant of authority, or by a provisional order subject to the review of the council.

### III. LEGAL SERVICES

One of the most important staff activities, particularly in our larger municipalities, relates to legal services.<sup>51</sup> City attorneys usually are elected or appointed by the council. In some instances, however, they are appointed by the mayor or manager. Since legal advice is compromised if it is influenced by the desires of those soliciting it, the attorney's office should, in considerable degree, be free from political influences. It is conceivable, however, that a rigid program of law enforcement would be seriously handicapped by an attorney antagonistic to the administration which he is to advise and serve.

The city attorney performs a variety of duties. His quasi-judicial duties include advice to the administration concerning the legality of proposed action. The sphere of authority of municipalities under state law is somewhat vague and indefinite. Charters and municipal ordinances frequently are not consistent with the state law. In this connection the functions of the attorney are very important and within his hands often lies the determination of whether certain wrongs shall go uncorrected, or whether the city shall render itself liable to unwarranted and illegal action. His ministerial duties comprehend the drafting of ordinances, the drawing up of contracts and leases for the city, the inspection of deeds and abstracts, the prosecution of violations of municipal ordinances, the institution of condemnation proceedings, and the usual work of prosecuting or defending in lawsuits by or against the city. In this latter connection arise many difficulties in settling claims against the city or making adjustments in other matters without recourse to law. In any event the requirements of a municipality for legal advice and service calls for the highest order of legal talent.

The office of city attorney has too often been a political dole to aspiring young barristers in the need of experience, or to older lawyers who are unable to sustain themselves in the ordinary course of practice. When it is considered that municipalities engage in corporate functions of a very extensive character and are

<sup>51</sup> Upson, *op. cit.*, 177-185; Reed, *op. cit.*, 118-135; W. B. Munro, *Municipal Government and Administration*, I, 216-233.

often confronted with problems the correct settlement of which involves the keenest of legal acumen, the office of city attorney assumes an increasing importance. The spectacle of a young and inexperienced or an old and incompetent city attorney defending the rights of the tax-payers of the city against the learned and successful counsel employed by the great utilities or powerful corporations has been a scene altogether too common in the administrative circles of machine governed cities. As in other phases of activity, the municipality must compete with private enterprise for its legal representation. One large damage suit lost would pay the salaries of an expert staff of legal advisers for several years. The office of city attorney should not be made the means of endowing a novice or pensioning a decrepit incompetent.

#### IV. PURCHASING

In recent years municipalities, learning rather laggingly from private enterprise, have been able to effect large economies by the establishment of central purchasing departments.<sup>52</sup> When the aggregate value of municipal purchases over a year's time is considered, the importance of purchasing is, indeed, apparent. The advantages of centralized purchasing may be indicated briefly: (1) it allows for purchases in large quantities; (2) it permits purchases to be large enough to secure competitive bidding; (3) it permits the imposition of standard minimum specifications for articles purchased; (4) it enables administrative departments to have goods delivered in quantities needed; (5) through prompt—usually cash—payment it reduces bids and saves money; (6) it enables the chief administrative officer more accurately to estimate the requirements of the administration and to evaluate the comparative efficiency of his departments.<sup>53</sup>

The buyer for the city should of course be an expert, but even then the superior advice of the administrative officer concerned should be considered in the purchase of technical articles. The delay of which many officials complain in the centralized purchasing plan may be eliminated by the establishment of a central supply house containing a small stock of staple requirements. Over-purchasing and the establishment of large inactive inventories must be guarded against in this connection.

<sup>52</sup> Arthur A. Thomas, *Principles of Government Purchasing* (1919), 10-20.

<sup>53</sup> Maxey, *op. cit.*, 356-357.

## V. TRANSPORTATION

Municipalities have also learned much from private enterprise in the centralization of transportation.<sup>54</sup> Municipal administration in even comparatively small cities requires numbers of motor vehicles. Formerly each department provided its own motor equipment and was entrusted with its care and maintenance. This was uneconomical and unbusinesslike, consequently transportation has been centralized. Centralized purchasing and maintenance of vehicles permits standardization, and the experimental adaptation of the types of vehicles required for particular work; it makes it possible to place the city's equipment under the care of expert mechanics at a far lower price than can be secured for such service by individual departments; it facilitates the establishment of a centralized garage and supply house; and it also provides the means for the collection of information with reference to operating records and the transportation requirements of the departments.

## VI. SUPERVISION OF PUBLIC PROPERTY

Finally, the care, maintenance, and supervision of public property has, in many instances, been brought under the administration of a central agency. Inasmuch as this is a specialized type of work, demanding a particular skill, and permitting a uniform type of control, it seems that centralized administration would secure better results than divided responsibility.

<sup>54</sup> Upson, *op. cit.*, 167-176.

## CHAPTER XLIV

### LOCAL RURAL GOVERNMENT

In this country, local authorities, rural and urban, are established by state and territorial law. Each jurisdiction has its own system of local government. While these methods differ widely in point of detail a general polity runs through all, namely, that each organized community or public corporation, full or *quasi*, should be self-governing. Here the state makes use of local public corporations in the administration of its governmental affairs. However, the rule is that local administration, or that which alone concerns the people of a given locality, is conducted by the local authorities organized as a county, township, city, town, village, or hamlet.

—EUGENE MCQUILLIN

#### *THE DEVELOPMENT OF RURAL LOCAL GOVERNMENTS*

The development of local government in the United States has followed historical rather than logical lines. The people living in colonial New England formed small, comparatively compact communities. As a consequence the town became the primary unit of local government, though counties were early established in the New England colonies and were used as judicial districts generally and in some instances as military districts and as the basis for registering land titles and equalizing taxes. In fact, the office of county attorney—now found in some form in every county of the Union—originated in New England.<sup>1</sup> But these early towns embraced a great deal more territory than the term now, usually denoting a small semi-urban district, generally is presumed to indicate. They included “both urban and rural communities within their jurisdiction, the thickly populated center and the rural areas surrounding it.”<sup>2</sup> The term town in New England still designates an area containing both urban and rural population, and, therefore, is not to be confused with the same term when applied to

<sup>1</sup> John A. Fairlie, *Local Government in Counties, Towns, and Villages* (1920), 23-26.

<sup>2</sup> K. H. Porter, *County and Township Government in the United States* (1922), 25.



other sections of the country where it denotes an urban center or with the term township which represents a purely rural area which ordinarily does not include the towns within its boundaries in its governmental jurisdiction. The New England town is unique; it is both an ordinary town and a township.

In the Middle colonies English influences in the form of the "Duke of Yorke's Laws," first introduced into New York after 1664 and later extended with modifications into New Jersey, Pennsylvania, and Delaware emphasized the county relatively more than the town and forced a compromise by means of which the county came to have a little stronger function in these colonies than it had in New England.<sup>3</sup> This compromise assumed two forms known as the New York or "supervisor" type and the Pennsylvania or "commissioner" form. In the New York type the town or township as it is generally called was relatively more important than the county. It "was clearly defined, had certain important functions of local government which it exercised independently of the county, and served as a unit of representation on the county board of supervisors."<sup>4</sup> The distinguishing feature of this type is that the chairmen of the township boards of supervisors constitute the membership of the county board which is the administrative agent of the county. In Pennsylvania, the county became relatively more important than the township which "was distinctly a subordinate unit, had virtually no independent functions, was not a unit of representation on the county board and served principally as an administrative district for the county."<sup>4</sup> There is in this type no connection between the membership of the county and township boards. The county commissioners are elected without regard to the township boundaries. These two types of township government, sometimes called the "township-county" and the "county-township" forms,<sup>5</sup> followed the westward movement into the Northwest along almost parallel lines from New York and Pennsylvania and are now found in the Northwest with only slight modifications usually in the direction of a little stronger position for the county. The New York type prevails in the North Central States<sup>6</sup> and the Pennsylvania form in the South

<sup>3</sup> Fairlie, *op. cit.*, 27-28; see also Herman G. James, *Local Government in the United States* (1921), 72.

<sup>4</sup> Porter, *op. cit.*, 55; George E. Howard, *Local Constitutional History of the United States* (1889), I, 63-83.

<sup>5</sup> Porter, *op. cit.*, 62-63.

<sup>6</sup> The New York type is now found in New York, New Jersey, Michigan, Illinois, Wisconsin, and Nebraska.

Central.<sup>7</sup> Illinois enjoys the distinction of being the only state in which both forms exist: the New York type in Northern Illinois and the Pennsylvania form in Southern Illinois.

In the South conditions were different. The early development of the slave trade and the importation of negroes, the development of large landholders, and the organization of social and political life on an agricultural basis made for an entirely different type of governmental organization. The large plantation was a self-sufficient economic unit. The climate was mild and life was in the open. There were no conditions to force the development of compact and interdependent communities of the New England type. The principal unit of local government became the county, which closely approximated its English prototype from which it was copied. The town meeting was unknown; the election of local officials was rare. These well-born aristocrats of the Southern plantations cherished no dislike toward the undemocratic institutions of the mother country. County officials were usually appointed by the governor, commonly upon the nomination of the justices of the peace. These justices were also gubernatorial appointees and constituted a county court which was primarily an administrative body and was the forerunner of the county commissioners court.

The county was the basis of representation in the colonial assembly.<sup>8</sup> In the far West conditions more nearly resembled those of the South, hence the county came to be the prevailing unit of local rural government in the Rocky Mountain and Pacific Coast States. At present there are about 3,000 counties in the United States, varying in size from twenty-four square miles in Bristol County, Rhode Island, to more than twenty thousand square miles in San Bernardino County, California, and in number in each state from three in Delaware to 254 in Texas, one of which is unorganized.

The result of the colonial developments in local government is the prevalence of four fairly distinct types of local rural control in the United States: (1) the New England town, (2) the county, (3) the township-county, and (4) the county-township. The county (the parish in Louisiana) is found in all the states, but as a governmental unit its importance decreases from section to section in the following order: (1) the South and West, (2) the South Central States, (3) the North Central, and (4) New England. The

<sup>7</sup> The Pennsylvania form prevails in Pennsylvania, Ohio, Indiana, Minnesota, Iowa, Missouri, Arkansas, North Dakota, South Dakota, Kansas, and Oklahoma.

<sup>8</sup> Fairlie, *op. cit.*, 18-32.

town ranks first in New England, and the township in the North Central States, though the division of functions between the county on the one hand and either the township or town on the other is constantly changing.

The tendency as between these forms is toward the gradual ascendancy of the county. The town of New England stubbornly persists and is the strongest barrier to the ultimate primacy of the county. The decline in the position of the township may be attributed to a number of influences. In the first place local government generally has degenerated, the weakest unit suffering most. There has been a growing indifference on the part of the public in local affairs. The capable person is not induced to participate personally in local politics and is less interested in the prerogatives of local self-government than its efficiency. Fictitious issues have generally characterized local politics.<sup>9</sup> The social welfare activities of the state have made inroads on local government. Power has drifted toward the larger unit.

All of these tendencies are largely the result of "the gradual decay of the sense and spirit of unity which once upon a time was a potent factor in molding the forms of local government. The sense of economic unity is gone; the people of a given small community no longer pretend to maintain anything like economic autonomy. Commercial and industrial intercourse have been developed to such a point through the instrumentality of new modes of transportation and wire communication that whole great areas are now economically interdependent.<sup>10</sup> Local ties no longer bind. Few important activities rest on a local basis. Thus, the township and the political philosophy underlying it are gradually being undermined. The larger unit of control under present conditions has the advantage and is most likely to acquire stronger control over its parts. In view of these tendencies the county will undoubtedly become a more important agency of the state. There is little justification for areas of rural government smaller than the county."<sup>11</sup>

#### THE LEGAL STATUS OF TOWNS, TOWNSHIPS, AND COUNTIES

Towns, townships, and counties are public corporations, since they are created by the state as agencies in the administration of

<sup>9</sup> H. S. Gilbertson, *The County* (1917), 25-33.

<sup>10</sup> Porter, *op. cit.*, 74-75.

<sup>11</sup> Herman G. James, *Local Government in the United States* (1921), 470-473.

civil government.<sup>12</sup> They are thus distinguished from private corporations, which do not exercise governmental functions. They are more accurately described as quasi-corporations and differ from municipal corporations in that they are primarily the agents of the state for its purposes while municipal corporations are mainly the agents of local communities for their own purposes.

### I. THE TOWN

The New England towns have a somewhat stronger corporate capacity than townships or counties. They closely resemble municipal corporations. They may sue and be sued in their own name, hold real and personal property, act as trustees of trust funds, make contracts, make by-laws, and grant and vote sums for schools, highways, and the support of the towns. They therefore have an anomalous position, being in some respects like a municipal corporation and in others like a county. While some of the New England towns are older than the state, they are regarded as territorial divisions of the state created by the state legislature and have only such powers as are expressly conferred upon them by statute.<sup>13</sup>

### II. THE TOWNSHIP

"Organized townships in the central states," said Fairlie, "are bodies corporate and politic. They may sue and be sued in the courts, may purchase and own land for corporate purposes, and can make contracts in the exercise of their legal powers. But their corporate capacity is limited, and they are more properly classed as quasi-corporations."<sup>14</sup> While they are districts primarily for local affairs and in this capacity partake of the characteristics of municipal corporations, they are at the same time agencies for county and state administration. They are relatively less important as local agents than either New England towns or southern and western counties.

### III. THE COUNTY

Counties are "agents of the state, with, however, a corporate capacity, which is to be made use of more for the benefit of the state

<sup>12</sup> J. F. Dillon, *Municipal Corporations* (1911), I, 62.

<sup>13</sup> Eugene McQuillin, *Municipal Corporations* (1911), I, 281-285.

<sup>14</sup> Fairlie, *op. cit.*, 167.



as a whole than for the benefit of a particular area.”<sup>15</sup> In their political capacity they are the agents and instrumentalities of the state for the performance of its functions.<sup>16</sup> All the powers with which they are entrusted as well as the duties imposed upon them are those of the state. Their corporate powers are very limited. They can sue and be sued, make contracts, acquire and hold real and personal property in connection with their other powers. They are, however, not generally liable for damages resulting from negligence. They are involuntary quasi-corporations and “are at most but local organizations of the state, which, for the purposes of civil administration, are invested with a few functions characteristic of a corporate existence. They are local subdivisions of the state, created by the sovereign power of the state, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them.”<sup>17</sup>

Counties generally enjoy certain constitutional guarantees. Their boundaries are not ordinarily subject to change by state legislatures except under certain conditions. Minimum areas and populations are generally fixed in state constitutions. Frequently county lines must be kept at a certain minimum distance from county seats. In some states county lines can be changed only by a two-thirds vote of both houses of the state legislature. It is also customary to submit such proposed changes to a referendum of the counties affected before they are actually made. County seats are not generally subject to change without referendum. The abolition of county offices and popular election of county officials and the reduction of their salaries can ordinarily be affected by only constitutional amendment. There are also limitations against the passage of special legislation intended to benefit or injure only one or a few counties of a state. The legal status of counties is further affected by various constitutional limitations relating to such matters as the power of taxation.<sup>18</sup>

<sup>15</sup> Frank J. Goodnow, *The Principles of the Administrative Law of the United States* (1905), 168.

<sup>16</sup> Thomas A. Cooley, *Constitutional Limitations* (8th Ed., 1927), I, 502 *et seq.*

<sup>17</sup> Dillon, *op. cit.*, I, 64.

<sup>18</sup> Porter, *op. cit.*, 78.

## TOWN GOVERNMENT IN NEW ENGLAND

## I. THE TOWN MEETING

The chief agent of government of the New England town is the town meeting, which is a primary assembly of its qualified voters. This meeting takes place after the issuing of a warrant designating the time and place of meeting and the business to be transacted and is called to order by the town clerk or one of the selectmen. There are both annual and special meetings. The first business at a meeting is the election of its presiding officer, who is called a moderator. It is regarded as a distinct honor to be a moderator though the position carries neither stipend nor important prerogatives. The town meeting is fairly well attended and debate is frequently lively. It elects the administrative officers of the town, levies taxes, and appropriates the funds for the town activities.<sup>19</sup>

## II. THE SELECTMEN

The administrative board of the town is usually three selectmen elected annually by the town meeting, though in Massachusetts they are selected for three years, one retiring each year. They have no powers to levy taxes or to pass ordinances. They are purely administrative officials. They are assisted by the town clerk, treasurer, assessor, school officials, and constables selected by the town meeting. Justices of the peace are elected by the town meeting, except in Massachusetts and Maine, where they are appointed by the governor.<sup>20</sup>

## TOWNSHIP GOVERNMENT IN THE CENTRAL STATES

## I. THE TOWNSHIP MEETING

In the northern tier of these states <sup>21</sup> the township meeting is the central organ of the township government. It is established by statute and is a primary assembly of the qualified voters of the township as in New England. The township meeting elects the officers of the township, passes by-laws subject to statutory limitations, and levies taxes except in New York, where taxes are levied

<sup>19</sup> Fairlie, *op. cit.*, 141-163.

<sup>20</sup> Everett Kimball, *State and Municipal Government in the United States* (1922), 333-336.

<sup>21</sup> These states are New York, New Jersey, Michigan, Illinois, Wisconsin, Minnesota, Nebraska, North Dakota, and South Dakota.

by the county board of supervisors. The township board in Michigan is empowered to levy taxes in case of failure of the township meeting. In the southern group of the Central States<sup>22</sup> there is no deliberative township meeting. The township officers are popularly elected and questions are submitted to referendum.

## II. TOWNSHIP BOARD

The township board is found in all the states where the township exists as an important unit of local government. There are two types: (1) an ex-officio board composed of the supervisor, clerk, treasurer, and justices of the peace, and (2) an elective board of usually three members.<sup>23</sup> These boards exercise such functions as fixing the tax rate, making appropriations, and in some instances equalizing taxes and looking after educational and health matters.

## III. CHIEF ADMINISTRATOR

In about half of the township states there is a chief administrator variously known as a supervisor, trustee, or chairman. He is the representative of the township on the county board if one exists and is a member of the township board if there be one. In those townships without the board he is a very important officer. He may perform the functions of township clerk, treasurer, assessor, overseer of the poor, road commissioner, and not infrequently has charge of school matters.<sup>24</sup>

## COUNTY GOVERNMENT

### I. THE FUNCTIONS OF COUNTY GOVERNMENT

The functions of county government may be classified roughly as follows:<sup>25</sup> (1) the maintenance of peace and good order; (2) the administration of justice; (3) the probating of wills and the administration of estates and trust funds; (4) the keeping of vital statistics; (5) generally the administration of poor relief; (6) the direction of school affairs except in New England; (7) the con-

<sup>22</sup> These states are Pennsylvania, Ohio, Indiana, Iowa, Kansas, and Missouri.

<sup>23</sup> This type of board is found in Indiana, Iowa, Minnesota, Missouri, the Dakotas, Ohio, Pennsylvania, and Wisconsin. See Porter, *op. cit.*, 312.

<sup>24</sup> See James, *op. cit.*, 277-278, and Porter, *op. cit.*, 312-313.

<sup>25</sup> Fairlie, *op. cit.*, 65-74; Gilbertson, *op. cit.*, 80-103, and James, *op. cit.*, 186-253.

struction and maintenance of highways; (8) assessment and collection of state taxes; (9) the conduct of elections; (10) and the recording of realty titles. It is the traditional unit of state militia organization, is an administrative subdivision for state purposes, and performs, in addition, several minor and miscellaneous functions.

## II. THE COUNTY BOARD

There exists in all the states of the Union except Rhode Island a general agent of county government<sup>26</sup> variously called the county board, the board of supervisors, the board of county commissioners, the county court, the levy court, the fiscal court, the commissioners' court, and the police jury.<sup>27</sup> This agent exercises limited legislative, administrative, and, in some instances, judicial powers, and possesses a variety of forms, though it is "customary to speak of two types of county boards;—the small board of commissioners elected at large for each county, and the much larger board of supervisors elected by townships and cities within each county."<sup>28</sup>

The small board consisting of three to seven members prevails in the majority of the states, including the New England States except Rhode Island,<sup>29</sup> all but seven of the Middle Atlantic and North Central States, the Mountain and Pacific States, and most of the Southern States. There are three county commissioners elected by the legislature in Connecticut. In Alabama, Oregon, and Texas the county judge is ex-officio a member of the commission and is its presiding officer.<sup>30</sup> The members of the small boards are generally elected, either at large or from districts.

There are twelve states in which the larger board is found.<sup>31</sup> This board is usually representative of townships or districts and sometimes contains as many as fifty members, averaging, however, around twenty-five members. In this group are found Arkansas, Kentucky, Missouri, and Tennessee where the board is composed of the county judge and the justices of the peace.

The smaller board is generally regarded as more desirable. It is

<sup>26</sup> Fairlie, *op. cit.*, 75.

<sup>27</sup> James, *op. cit.*, 131.

<sup>28</sup> Fairlie, *op. cit.*, 75.

<sup>29</sup> The sheriffs are the principal county officers in Rhode Island and are elected by the legislature. Porter, *op. cit.*, 71.

<sup>30</sup> In Texas the commission is called the Commissioners' Court though it exercises primarily administrative powers.

<sup>31</sup> Porter, *op. cit.*, 71.



particularly suitable for administrative purposes since responsibility is largely concentrated and action will likely be more expeditious. It can assemble more quickly and will come more nearly considering the interests of the county as a whole, and is less likely to be subject to deadlocks and compromises. The large board is more expensive and is really unnecessary since the county exercises practically no legislative authority. It is likely to be dominated by petty local interests in the exercise of its powers.<sup>32</sup> A small board elected at large is preferable.

The powers and duties of the county boards differ as widely as their forms. They are strictly statutory in character and pertain to legislation or administration. Their legislative powers are primarily of a financial nature relating to the levying of taxes and the borrowing or appropriating of money for purposes specified by law. With few exceptions they levy taxes, subject to certain constitutional limitations. In general, however, with considerable variation, they may levy taxes and appropriate money for the construction of county buildings, especially court houses and jails, and, in some instances, poorhouses, asylums, hospitals, and libraries, for the building of highways and bridges, for poor relief, for public health and school purposes, and for the salaries of county officials if they are not paid by fees. In California and Maryland they seem to enjoy the largest amount of legislative authority and in a few states they exercise a local ordinance power.

Much more important than their legislative functions are their administrative powers.<sup>33</sup> Possibly the most important of these powers is that of authorizing the disbursement of the county funds in accordance with the purposes for which they were raised and appropriated. While an increasing number of states provide county auditors, in most instances the county boards are subject to practically no supervision in the raising and spending of county revenues. They are generally charged with the care of the property of the county, including the repair of its buildings, roads, and bridges. They generally canvass and report election returns, and, in some instances, grant licenses, appoint minor local officials, and supervise the administrative subdivisions of the county. Among the latter activities, probably the most important is that of equalizing the tax assessments of the minor subdivisions of the county.<sup>34</sup>

<sup>32</sup> James, *op. cit.*, 133-134.

<sup>33</sup> Goodnow, *op. cit.*, 193.

<sup>34</sup> Fairlie, *op. cit.*, 85-94.

## III. THE COUNTY JUDGE

The county judge presiding over a separate county court is found in only about one-third of the states, although other states have special courts for the more populous counties. The most common arrangement is to group counties into districts or circuits for judicial purposes. The judges of the courts of these larger divisions hold court in the counties, but such courts are not county courts nor are their judges county judges.<sup>35</sup> County judges are generally popularly elected for short terms, varying from two to six years, and exercise a limited original jurisdiction of both a criminal and a civil character, appellate jurisdiction over the justices of the peace, and generally probate jurisdiction, though in some instances there is a separate probate judge. In those states in which the county judges preside over the county boards, they exercise administrative powers. They are generally paid by a salary, though in some states they are compensated by fees or *per diem*. If the county court is one of record, a clerk is associated with the county judge.<sup>36</sup>

## IV. THE PROSECUTING ATTORNEY

Next in importance to the county judge is the prosecuting attorney, generally known as the district or county attorney. The office of prosecuting attorney is a direct development from the historical colonial attorney-generalship. The most important duties of the attorney arise, of course, in connection with the prosecution of crimes and offenses against the state. The fact that in most states criminal prosecutions, except for petty offenses, must be based upon an indictment by a grand jury necessitates the collection and presentation of most of the cases for its consideration and the giving of advice with reference to indictments. Where the states have abolished indictment by grand jury in ordinary cases, as in Michigan, Wisconsin, and Minnesota, and substituted indictment by information filed by the prosecuting attorney, his duties are appreciably more important. The prosecuting attorney is not a counsel for those who bring complaints against a defendant, but a public official assisting in the administration of justice. "The prosecuting officer represents the public interest, which can never

<sup>35</sup> For a discussion of the judicial affairs of the county, see Ch. 38.

<sup>36</sup> Porter, *op. cit.*, 156-157; James, *op. cit.*, 139-142.

be promoted by the conviction of the innocent. His object, like that of the court, should be simply justice; and he has no right to sacrifice this to any pride of professional success."<sup>37</sup> Inasmuch as criminal prosecutions are brought in the name of the state, the prosecuting attorney is thus in much the same position as the sheriff as regards his relation to the rest of the county government. His criminal prosecution extends, however, to public officials as well as private individuals, and in that capacity he may be as influential and effective as his ability and integrity will permit.<sup>38</sup> In addition to his criminal prosecution, he acts for the state in any civil suit to which it is a party, and, of course, represents the counties in the same way. When it is considered that the county is a quasi-municipal corporation and may, in some instances, be sued without its consent, this function in some instances may be of the greatest importance.

It is quite evident that the holder of this office is of the very highest influence in any program of law enforcement. If he is negligent and inefficient, the guilty may escape and the innocent may suffer serious annoyance. Or if he is unscrupulous and corrupt, he may utilize his office for his own emolument almost without limit.<sup>39</sup> The honesty, fearlessness, and integrity of a prosecuting attorney often account for the difference between a law abiding community and a criminal paradise.

Of an entirely extraneous character are the duties imposed upon the prosecutor in requiring him to give advice to all county officers. That they often need advice cannot be doubted; that the public prosecutor is the proper official to give it is another question. The fact remains that oftentimes he, or his office, draws up and passes upon the validity of all contracts to which the county is a party, and otherwise handles considerable clerical work of a legal nature not in any way connected with his function as public prosecutor. And in large counties engaging in many corporate activities administrative duties of this type may consume so much of his time and energy as to incapacitate him for his major function.

Public prosecutors are elective officers except in Connecticut and New Jersey. In the former they are appointed by the superior

<sup>37</sup> *Hurd v. People* (1872), 25 Mich. 404.

<sup>38</sup> Goodnow, *op. cit.*, 298, 411.

<sup>39</sup> See C. Mellen, "How a Tammany District Attorney Used His Office for His Own Ends," 8 *Nat'l Mun. Rev.*, 291 (1919); also, H. S. Gans, "The Public Prosecutor; His Powers, Temptations and Limitations," 47 *Annals of Am. Acad. of Pol. and Soc. Sci.*, 120 (1913).

court and in the latter by the legislature. In those states having both district and county attorneys there is likely to be an overlapping of jurisdictions.<sup>40</sup> Maryland and Kentucky, by constitutional provision, require prosecuting attorneys to be practicing lawyers, and in other states the courts have held that this requirement is inherent in the nature of the office. Peculiarly enough, the courts of California, Minnesota, and South Dakota have declared that such a requirement is not essential, and that the legislature has no power to add to the qualifications constitutionally imposed.<sup>41</sup> Prosecuting attorneys receive either salaries or fees for their services. In some instances their fees are contingent upon conviction, an unjustifiable and compromising arrangement since the sole purpose of prosecuting attorneys is to aid in the administration of justice. Compensation of such officials should be provided for in the form of salaries which should be adequate to secure able and experienced lawyers.

## V. THE SHERIFF

The sheriff, while usually discussed as a local and county functionary, is in reality a state officer. He is related to the rest of the governmental machinery of the county chiefly by the identity of their geographical jurisdiction. He is concerned with the enforcement of state law, his prisoners are prisoners of the state, and he executes the orders of the court in the name of the state. "As conservator of the peace in his county, the sheriff is the representative of the sovereign power of the state for that purpose."<sup>42</sup> "He may upon view, without writ or process, commit to prison all persons who break the peace or attempt to break it; he may award process of the peace and bind any one in recognizance to keep it. He is bound, *ex officio*, to pursue and take all traitors, murderers, felons, and other misdoers and commit them to jail for safe custody. For this purpose he may command the *posse comitatus*, or power of the county; and this summons everyone over the age of fifteen years is bound to obey."<sup>43</sup> Indeed, there is not another peace officer in the United States with as broad theoretical juris-

<sup>40</sup> The court in which the case is tried determines, of course, which official shall prosecute. Thus city and county attorneys often have overlapping jurisdictions without serious difficulties resulting.

<sup>41</sup> *People v. Dorsey* (1867), 32 Cal. 296; *State v. Clough* (1876), 23 Minn. 17; *Howard v. Burns* (1901), 14 S. Dak. 383.

<sup>42</sup> Fairlie, *op. cit.*, 109.

<sup>43</sup> *South v. Maryland* (1855), 18 Howard 396.



diction as the county sheriff. However, he is sometimes quite content to leave by far the greater part of his duties as guardian of the peace to the more highly organized municipal police. In frontier times he was a powerful and picturesque figure, but by a process of refinement he has come to occupy too frequently a larger place in the imagination of small boys and cinema directors than in the apprehension of criminals.

This is not to imply a decline in his importance and necessity but simply to indicate a change in the direction of his functions. He is primarily an executive officer of the court and in this capacity fulfils a very necessary duty. He is responsible in the first place for the execution of writs of mesne process, such as the summons of the jury and defendants, warrants of arrest, subpoenas of witnesses, writs of attachment, and other court orders. In the second place, he executes all writs of final process including the collection of amounts awarded in judgments by seizure and sale of property if necessary and the hanging or electrocution of murderers, unless this function has been delegated to state prison officials.<sup>44</sup> He is the custodian of prisoners. He must exercise reasonable care in the preservation of their lives, and is, in some instances, liable to removal or suit for damages for the death of prisoners by mob violence if he has failed to take proper precautions.<sup>45</sup>

The sheriff also exercises functions of a rather miscellaneous type. In many counties in the South he is ex-officio tax collector, especially where the county is small, and in many instances is charged with the collection of delinquent taxes. A survival of his historic power as an election official is his duty in many states to make official announcement of forthcoming contests. In the South also he retains, in some cases, the contemporary equivalent of his ancient prerogative as custodian of estates escheating to the Crown—the function of public administrator.<sup>46</sup>

The sheriff is an elective official in every state except Rhode Island, where he is chosen annually by the general assembly of the state. The prevailing tenure is for two years, although a few states have terms of three or four years. Immediate reëlection frequently is restricted to one or two terms. In the United States his qualifications are citizenship, adult age, residence in the county,

<sup>44</sup> See Porter, *op. cit.*, 168 *et seq.*

<sup>45</sup> See Fairlie, *op. cit.*, 111. In Illinois a governor must remove a sheriff who allows a prisoner to be taken by a mob. See C. J. Turch, "The Governor's Power to Remove County Officials," 14 *Kentucky Law Journal*, 330 (1926).

<sup>46</sup> See Porter, *op. cit.*, 168-169.

and the ability to execute a satisfactory bond. He usually has the power to appoint a number of deputies to act as his subordinates in a ministerial capacity, who may perform any ministerial act which the sheriff may himself do. He receives for compensation either a fixed salary or a certain percentage of fees collected; under either system his post is one of the most remunerative of county offices.<sup>47</sup>

## VI. THE CORONER

Closely allied with the work of the sheriff is that of the coroner, whose primary function is to investigate deaths occurring under such unusual circumstances or conditions as to indicate that violence or other unlawful means may have been used.<sup>48</sup> "The inquest must be held upon a view of the body. The coroner empanels a jury, usually of six persons, summons witnesses, and as a general rule a physician or surgeon to give testimony. . . . The coroner instructs the jury as to the law; and the jury gives a verdict as to the facts. Any person accused in the verdict is liable to arrest; and if not already in custody, the coroner should issue a warrant for his arrest and commit him to jail for trial."<sup>49</sup> Coroners presumably are learned in medicine and in the law; actually, such qualifications seldom prevail. In Massachusetts, New Jersey, and New Hampshire competent medical examiners are used. The coroner usually is popularly elected for a short term, varying from two to four years, though in some instances he is appointed by the governor or by the courts. He is generally paid by fees from the county treasury, though sometimes by salary or by both.<sup>50</sup>

## VII. COUNTY CLERKS

If the county has a separate county court of record, there is provided a clerk for the court who may be called a county court clerk. If the county has no county court of record, but is a part of a judicial district or a circuit, it will have its own clerk to wait on the district or circuit court when it convenes within the county. This clerk may be called a circuit court clerk, as in Tennessee, where there is also a county court clerk who acts as a secretary

<sup>47</sup> In Cuyahoga County, Ohio, the sheriff receives \$15,000.00 a year. In New York County the office is said to yield \$50,000.00 a year. In some Texas counties it is worth upwards of \$25,000.00 a year.

<sup>48</sup> Oscar T. Schultz, "The Coroner's Office," 47 *Annals of the Am. Acad. of Pol. and Soc. Sci.*, 112-119 (1913).

<sup>49</sup> Fairlie, *op. cit.*, 114.

<sup>50</sup> James, *op. cit.*, 158.

to the county board which is called a county court and is composed of a county judge and the justices of the peace in quarter sessions. The county judge does not hold a separate county court but simply acts as chairman of the county court. There may be also a clerk of the chancery courts, as in Tennessee and Mississippi. "In most of the states the duties of court clerk and secretary to the county board are combined in one official, who often has other duties not covered by either of his two main functions."<sup>51</sup> In most states these clerks regardless of the capacity in which they serve are elected for short terms, varying from two years in most instances to four years in some.<sup>52</sup>

As court clerks, these officers open and adjourn the courts, keep a record of their proceedings and orders, and have the custody of their records and seals. They docket cases, issue writs, and enter the final judgments of the courts. They attest the correctness of the transcript of the court records and have the custody of the property or money in the possession of the court. They may exercise quasi-judicial functions imposed by statute, such as the taxation of costs, the approval of bonds, and the assessment of damages in case of default, though their duties are primarily ministerial in character.<sup>53</sup> As clerks to county boards sometimes called county courts they are really not judicial officials but only secretaries. Their duties consist almost exclusively in keeping the minutes of the proceedings of the boards; however, they may act in some measure as county auditors if such officials are not provided for, and in this capacity they examine bills and present them for the approval of the board.

As county clerk they frequently have duties separate and distinct from those connected with courts or boards. In this capacity they issue marriage licenses, prepare election ballots, have charge of the election returns, and issue election certificates to locally elected officials. If county recorders are not provided, they are charged with the recording of deeds and mortgages. They are frequently concerned with the preparation of the tax books and grant licenses to hunters and operators of dance halls and pool rooms conducted outside city limits.<sup>54</sup>

<sup>51</sup> Fairlie, *op. cit.*, 116.

<sup>52</sup> In New Hampshire, Vermont, and Connecticut, they are appointed by the judges for indefinite terms; in Rhode Island, they are annually elected by the general assembly. They hold office for five years in Massachusetts, six in Maryland, and eight in Virginia.

<sup>53</sup> James, *op. cit.*, 142-144.

<sup>54</sup> Porter, *op. cit.*, 140-156.

"In Illinois, the county clerk is tending to become the *de facto* chief executive officer of the county, as his numerous functions bring him in official contact with all branches of county administration." <sup>55</sup> It has been suggested that the county clerk might be appointed by the county board, stripped of his functions as a court clerk, and made the chief administrative official of the county responsible to the board, occupying a position similar to that of the county or town clerk in England. This suggestion is meritorious for the reason that the county is a headless unit of government, but unlike the nation or the state does not need an independently elected executive. <sup>56</sup>

### VIII. THE RECORDER OR REGISTER OF DEEDS

In this connection also should be mentioned the fact that many states provide for an official known as the county recorder, in whose hands all recording other than that performed by the court clerks and county clerks is placed. His principal duty is to keep a record of land titles. Since land may be gained originally either by prescription or patent, this function is often of the greatest importance in determining the ownership of lands and in clearing up clouded titles. When an original owner sells his land he transfers his title by means of a deed, which ordinarily must be registered with the recorder as a notice to innocent purchasers. In counties containing cities, there is likely to be a large number of real estate transactions and the duties of the recorder increased and his work complicated. More than half of the states provide for a recorder and in one-third he is a constitutional officer. He is generally popularly elected for a term varying from two to four years. As a rule no special qualifications are required and he is usually paid by fees fixed by law, but in some states where the salary system for county officials has been introduced he receives a salary. <sup>57</sup>

### IX. THE COUNTY TREASURER

By far the most important of the county finance officers is the treasurer. A statement of his functions is comparatively simple; he is expected to receive county funds, properly to record their receipt, to make disbursements on order from the proper authority,

<sup>55</sup> Fairlie, *op. cit.*, 118.

<sup>56</sup> James, *op. cit.*, 171; Porter, *op. cit.*, 154-156.

<sup>57</sup> Fairlie, *op. cit.*, 117.



and to have custody of funds in the meantime. The performance of these functions is one of the most complicated tasks confronting any county official. The treasurer, in many instances, carries a multiplicity of accounts that necessitate bookkeeping of a very intricate and technical sort. He generally receives all moneys payable to the county and subsequently pays to municipalities, improvement districts, and the state government their pro rata share of the revenues. Frequently he is charged with the selection of the depository, and is given the interest therefrom accruing for the use of the county funds. He is almost invariably an elective officer, chosen for a two or four year term. Frequently he may not immediately succeed himself. He generally receives an inadequate salary, with the opportunity to increase his earnings by sharp bargaining with the depositories.<sup>58</sup>

#### X. COUNTY ASSESSOR

This officer is found in practically all the states having the county-district as distinguished from the county-township system of government.<sup>59</sup> While his duties are prescribed by statute and vary in many details in different states, in general they relate to the assessment of all taxable property. He prepares a list of persons subject to taxation, with a description and valuation of their property holdings, classified usually as realty and personalty. On the basis of his valuations the taxes are determined simply by applying the rate levied by the taxing authority. In some states property owners are required to file a list of all property owned, and its value, with the assessor; however, such statements do not conclude the power of the assessor to determine valuation. Real estate assessments are against the property rather than the person; consequently, errors in name do not render assessments void. Real estate must be identified and described and a separate valuation given to each tract. Judicial review of valuation is granted only when there is evidence of gross inequality; merely over- or undervaluation does not serve as a ground for suit. Boards of equalization generally are provided to review objectionable assessments. The assessor is generally popularly elected for a term of two years though in the Southern States a four-year term is not infrequent.

<sup>58</sup> Porter, *op. cit.*, 220 *et seq.*

<sup>59</sup> In those states not having a county assessor, the duties of this officer are entrusted to some other county officer or to a town or township officer as in New England and those states having the supervisor type of county government, as New York.

While the assessment of property is a task that requires both common sense and frequently technical knowledge, as a rule no special qualifications are required for the office. The assessor is generally paid by fees fixed on a percentage basis of the assessed property value, though in some states he receives a salary.

### XI. THE TAX COLLECTOR

The function of this official is simply that of collecting taxes. He usually visits different sections of the county and temporarily establishes an office for the receipt of taxes for the immediate vicinity. He records these payments and subsequently delivers all funds, books, records, and papers to the county treasurer. He is an elective officer, and receives usually a certain percentage of the taxes collected. The tax collector as a county official is found in only six states. The sheriff, and the trustee, and other county officials collect taxes in a few states. In the great majority of the states taxes are collected by township or district officials who turn over their collections and records to the county treasurer.<sup>60</sup>

### XII. THE COUNTY AUDITOR

County auditors are found as regular county officers in one-third of the states and a number of counties in other states. They are particularly independent in the North Central States. County clerks in some instances perform the functions of auditors. The auditors are generally popularly elected, though they are appointed by the Supreme Court in New Hampshire, by the county court in Vermont, and in Connecticut by the "convention of members of the legislature."<sup>61</sup> In some states, as in Michigan and Pennsylvania, there is a board of county auditors.<sup>62</sup>

The chief functions of the auditor are to audit all county books at periodic intervals and in some instances to act as a comptroller. Ordinarily he is not permitted to scrutinize the daily financial transactions of the other county officers. Since he is generally a popularly elected official for a short term, he is not in a sufficiently independent position to act as an effective check. He is likely to be politically dependent upon his coequals over whom he is expected to have supervision. He undoubtedly should be a state official appointed by the financial authority of the state.

<sup>60</sup> Porter, *op. cit.*, 225-227.

<sup>61</sup> Fairlie, *op. cit.*, 125.

<sup>62</sup> James, *op. cit.*, 169.

## XIII. SCHOOL AUTHORITIES

County school administration usually is under the direction of a county school superintendent.<sup>63</sup> In collaboration with the county board, appointed by state or county authorities or elected at large or from districts within the county,<sup>64</sup> and the school boards of local districts, he is the general supervisor of education within the county. He or his assistants visit schools, inspect school houses and equipment, supervise the taking of the school census, and usually pass upon all claims against any school district within the county prior to their payment. Urban school systems are ordinarily made independent by incorporation into "independent school districts." The county superintendent is generally popularly elected, though in some states he is appointed either by state authorities or by local boards.<sup>65</sup> He is paid by a fixed salary which is generally inadequate to command the services of a capable superintendent.

In addition to these more important county officials there are numerous minor officers varying in their number, importance, and functions with the states. County surveyors are found in all the states except in the New England States, New York, and New Jersey. They are generally popularly elected for a term of two or four years and paid by fees. Their chief function is to survey lands on the application of individuals and orders of the courts. They may assist state or county engineers in laying out public roads. They were formerly rather important officials before public boundaries and the metes and bounds of private lands became fixed. County health officers have more recently appeared and are becoming more important. They are usually practicing physicians and are appointed by county or local boards. County engineers, drainage commissions, justices of the peace, road officers, and poor overseers are quite frequently found among the minor officials of the county or its subdivisions.<sup>66</sup>

## THE GOVERNMENT OF VILLAGES

The more populous centers of counties are generally incorporated into towns, villages, or boroughs. This is true to a limited

<sup>63</sup> There are no county superintendents of education in New England.

<sup>64</sup> Fairlie, *op. cit.*, 132-134.

<sup>65</sup> Frank H. Harrin, "County Administration of School Affairs in Its Relation to the State Department," 47 *Annals of Am. Acad. of Pol. and Soc. Sci.*, 153-165 (1913).

<sup>66</sup> James, *op. cit.*, 182-184.

extent even in New England where the town meeting still retains much of its former vigor. There are more than ten thousand such incorporated areas in the United States. These areas are usually incorporated in accordance with general statutory provisions giving the conditions which must be met by communities incorporating for the purpose of local government. In some instances, however, such incorporations are established by a special act of the legislature.<sup>67</sup> Usually a minimum population is required for incorporation, ranging from one hundred to three hundred persons. Incorporation is generally effected by a petition originated by the inhabitants of the area to be incorporated and approved by county, township officers. After approval by such officers the petition ordinarily must be submitted to the voters for approval or rejection.

The government of these areas is usually entrusted to a board generally consisting of from five to seven members elected at large, though in some instances from wards. The executive is most frequently a chairman chosen by the board. In some instances, however, a mayor elected at large is regarded as more compatible with the importance of the village. These villages are public corporations; they pass ordinances, in accordance with statutes, and generally exercise functions relating to local buildings, finances, streets, health, and order.<sup>68</sup>

<sup>67</sup> In Connecticut all boroughs are incorporated by special act.

<sup>68</sup> Fairlie, *op. cit.*, 200-212.



## CHAPTER XLV

### REORGANIZATION OF COUNTY GOVERNMENT

Government is like a house which must be adapted in construction to the peculiar purposes and needs of those who dwell in it, and must be altered from time to time as those needs change and multiply.

—JAMES WILFORD GARNER

#### *THE NECESSITY OF CONSTITUTIONAL REVISION*

County government has been designated, with considerable justification, as the jungle of American politics. "County government is the most backward of all our political units, the most neglected by the public, the most boss-ridden, the least efficiently organized, and the most corrupt and incompetent, and, by reason of constitutional limitations, the most difficult to reform."<sup>1</sup> Of particular importance for reconstructional purposes is the concluding statement of this report. It is true that antiquated machinery and methods are imposed upon counties by the provisions of state constitutions framed to deal with conditions and problems that have largely or entirely disappeared.<sup>2</sup> The constitutionalists of another century were unable to foresee the changes which alterations in our social and economic fabric would make necessary in the structure of local governmental institutions.

A satisfactory reconstruction of county government is impossible as long as the archaic provisions of our state constitutions are guarded with uncompromising insistence by the worshippers of form at the expense of economy and efficiency. Any attempt at structural reorganization without a change in the fundamental law of those states whose constitutions are meticulously elaborated must necessarily temporize with existing conditions and consequently perpetuate the irresponsibility and the inefficiency of the present system. Municipalities long since have awakened to the

<sup>1</sup> *Report*, Committee on County Government, National Municipal League (1917).

<sup>2</sup> See in this connection S. D. Myres, Jr., "Mysticism, Realism, and the Texas Constitution of 1876," 9 *Southwestern Pol. and Soc. Sci. Quar.* (1928), and "Government in a New Age," *Southwest Review* (1929).

inadvisability of attempting to perform twentieth-century tasks with eighteenth-century machinery and under century-old restrictions. The same task of aggressive and thorough constitutional reform which faced municipal reconstructionists is confronting those who are attempting to readjust county government in accordance with recent developments and needs.<sup>3</sup> The manner and technique of the necessary constitutional reform is not a subject within the appropriate province of this discussion. It is sufficient for our purposes to indicate the organic and fundamental character of a program of county reorganization.

### THE UNDESIRABILITY OF EXCESSIVE UNIFORMITY

In solving the problem of constitutional reform provision should be made for some variation in the structure of county government.<sup>4</sup> Excessive uniformity is as undesirable in county government as in municipal government. "There is perhaps no state in the Union," said James, "in which greater variations exist in the population, area, and economic conditions of counties than in Texas. It is natural to assume that such variations might very well demand corresponding variations in the legal provisions concerning county government. Yet we find the constitution requiring for each county, no matter what its size, a county judge, four county commissioners, not less than four justices of the peace, a county clerk, a sheriff, a county attorney, a county treasurer, a county surveyor, and a county assessor. This makes a minimum of fifteen county officers required by the constitution for every county."<sup>5</sup> When it is considered that Cochran County had, in 1929, a total population of sixty-six, and that county populations of less than 2,500 are comparatively common in the western portion of the state, such constitutional requirements seem unjustifiable. This condition is not peculiar to Texas, however; most state constitutions require for each county the same number of officials, endow it with the same powers, and prescribe the same type of organization. Such a system is comparable to the general charter plan for municipalities, and is unsatisfactory for the same reasons. Varying conditions necessitate differences in governmental structures,

<sup>3</sup> William L. Bailey, "The County Community and Its Government," 47 *Annals of Am. Acad. of Pol. and Soc. Sci.*, 14-25 (1913).

<sup>4</sup> H. S. Gilbertson, "Elements of the County Problem," 47 *Annals of Am. Acad. of Pol. and Soc. Sci.*, 3-13 (1913).

<sup>5</sup> H. G. James, *County Government in Texas*, 92 (Revised by Irvin Stewart, 1925).

powers, and personnel, the possibilities of which are denied by constitutional uniformity. Conceivably counties might be given home rule with reference to their governmental organization.<sup>6</sup> Inasmuch as the degree of articulation between the governments of the state and the county is much more intimate than between those of the state and the municipality, due to the fact that the functions of the one are largely governmental and those of the other almost wholly corporate, this hardly seems advisable.<sup>7</sup> The success of home rule, even as regards municipalities, is still somewhat a doubtful matter; and the necessity of state control of county affairs militates against its application to counties. Or the classified charter system for counties might be adopted; counties are at present being classified in Pennsylvania and Illinois for administrative and legislative purposes, but not for the purpose of determining their governmental structure. The same objections apply to counties as to cities in the adoption of classified charters—the difficulty of accurate classification and the impossibility of making proper provision for the recognition of the factors of variation. Probably the best solution for counties, as well as for municipalities, is the adoption of the optional charter plan, presenting a number of alternatives, such as that provided by Louisiana in 1921,<sup>8</sup> and proposed in Virginia in 1924.<sup>9</sup>

#### THE REMEDY FOR DECENTRALIZATION OF POWER

A second feature of a comprehensive program of reform is the centralization of power and the separation of functions in county government. At the present time the county board generally performs legislative, executive, and quasi-judicial functions, but exercises very little administrative control.<sup>10</sup> Its functions logically

<sup>6</sup> California adopted this plan in 1911, Maryland in 1915, and Arkansas in 1924 (held unconstitutional). For a reproduction of the Los Angeles County charter, see H. S. Gilbertson, *The County* (1917), 219-246. It is discussed by L. R. Works, "The Los Angeles County Charter," 47 *Annals of Am. Acad. of Pol. and Soc. Sci.*, 229-236 (1913). The reforms, it should be mentioned, are due to constitutional inhibitions, not thoroughgoing.

<sup>7</sup> See H. G. James, *Local Government in the United States* (1921), 431 *et seq.* Cf. his *County Government in Texas*, 93 *et seq.*, on the question of home rule for counties.

<sup>8</sup> For the Louisiana plan see the *Louisiana State Constitution* of 1921, Art. XIV, Sec. 3.

<sup>9</sup> A discussion of the Virginia plan appears in 14 *Nat'l Mun. Rev.*, 690.

<sup>10</sup> Michigan, California, and Maryland are the only exceptions to this rule. While it is true that most of the functions of county officers are purely ministerial and prescribed by constitution and statute, there are certain ques-

should be confined to the scrutiny and general overseeing of county administration, and to the formation of such policies as are necessary to supplement those formulated by the legislature. The necessity for distinction between politics and administration is as essential in county as in municipal government. But in order to insure the administrative supremacy of county boards certain other changes are prerequisite.

### I. THE SEPARATION OF STATE AND LOCAL OFFICERS

The first of these is the complete elimination from its jurisdiction of those officers who are directly and actively agents of the state.<sup>11</sup> "County judges, prosecuting attorneys, court clerks, sheriffs, as well as constables and justices of the peace are in no sense county officers, but state officials. The folly of entrusting the enforcement of state laws to locally elected officers without very strict state supervision and control over them is theoretically self-evident and has in practice demonstrated its reality. To entrust a locally elected county attorney with the prosecution of offenders against state laws that do not meet with local approval is simply to give the locality, or rather, the controlling political interests in a locality, a veto on state legislation so far as that locality is concerned. The same situation applies to all the subordinate judicial officers, such as justices of the peace, constables, and sheriff, as well as to the county judge himself."<sup>12</sup>

### II. THE APPOINTMENT OF PURELY STATE OFFICERS

Those officials who are exclusively agents of the state should not be locally elected but appointed by state authorities. "Not being county officers, their constitutional powers would not be affected in any way by the particular type of local charter adopted. Consequently they would be stripped of their local powers, which should be entrusted to purely local officers. This separation of judicial

tions which are peculiar to the county. In any event, supervisory power in the hands of the board is an essential prerequisite to coordination of administration. See James, *Local Government in the United States*, 130 *et seq.*

<sup>11</sup> See in this connection, K. H. Porter, *County and Township Government in the United States* (1922), 203. The problem assumes appreciable pertinency in a consideration of the redefinition of functions which follows. Such a distinction would not only simplify the administrative organization of the county but would, in considerable degree, facilitate central administrative control of state agencies.

<sup>12</sup> James, *County Government in Texas*, 94.



and administrative functions would be desirable in and of itself, especially in the case of the county judge. The qualities needed for a good judge are not by any means those needed for a good administrative officer, and are rarely found in one and the same person. If to these two qualifications demanded of a really successful county judge be added a third requirement which is prerequisite to getting the office, namely, being a good politician, it is not surprising that county judges as a rule possess only the last-named and only indispensable qualification."<sup>13</sup>

While these officials act in a dual capacity, serving both the state and the county, the experience of the vast majority of states points to the necessity of central supervision and control. Effective supervision of popularly elected officers is almost impossible. The power of appointment and removal is necessary for administrative control. The growth in the functions of state government tends to make less desirable the retention of purely artificial divisions of state authority. The consensus of taxation experts indicates that the development of the state income tax,<sup>14</sup> as well as improved methods of administration of property taxes practically require that the state be made the unit of administration. Matters for which the state determines the policy should be administered by state officials. It is as logical and necessary for the state government to have its administrative officials in its subdivisions as it is for the national government to have its agents in every locality of the nation.

### THE COUNTY MANAGER PLAN

With reference to other county officers whose functions are primarily related to local matters such as school affairs and health administration, centralized administrative supervision would probably insure efficiency and the maintenance of high standards even though the officers themselves remained selective by a local body. The major problem arising in connection with such officers is

<sup>13</sup> *Ibid.*, 95. This endless confusion of state and local, administrative and judicial, officials has been the subject of much criticism upon the part of constitutional commentators. See Myres, "Mysticism, Realism, and the Texas Constitution of 1876," 9 *Southwestern Pol. and Soc. Sci. Quar.* (1928).

<sup>14</sup> See in this connection, C. J. Bullock, "The State Income Tax versus the Classified Property Tax," *Proceedings Tenth Natl. Tax Conference*, 362 (1916); also H. L. Lutz, *Public Finance* (1924), Chs. XVIII-XXII. The economic and political scientists substantially are agreed that local tax administration, even for local purposes, is a failure.

the centralization of responsibility.<sup>15</sup> Such centralization could best be accomplished, in the opinion of many authorities, by the adoption of the county manager plan.

### I. THE COUNTY MANAGER

Under this system, which approximates in its fundamental aspects the familiar city manager form of municipal government, the county board would be relieved of all actual administrative duties. Responsibility for administration would be vested in an appointive county manager, directly responsible to the board and holding office at its pleasure. To assure centralization of responsibility, such a plan further would necessitate the changing of all county officers, except the board itself, from elective to appointive officials. Attorney, director of finance, engineer, health officer—all would be appointed by the county manager, and would be subject to removal by him.<sup>16</sup>

### II. CIVIL SERVICE

There is certainly little to be said for the present method of electing purely administrative officers performing highly circumscribed ministerial tasks. The making of such officials appointive, however, does not assure the elimination of political considerations in their selection. It is generally agreed that the solution of the personnel problem in county government is the placing of its officers within the jurisdiction of a state civil service system.<sup>17</sup> The administrative officers should be placed in the unclassified list, together with ordinary unskilled labor. All other county officers should be placed in the classified service, which should be divided into competitive and non-competitive services, accordingly as fit-

<sup>15</sup> See K. H. Porter, "A Wet Blanket on the County Manager Plan," 18 *Nat'l. Mun. Rev.*, 5-8 (1929), and R. A. Egger, "The Manager Plan Appropriate for Counties," *ibid.*, 237-241.

<sup>16</sup> In county, as in municipal, government it is attempted completely to eliminate political influences from school administration by making its actual organization entirely independent, usually by the creation of a separate county school board. The tendency at the present time is toward the county unit plan, whereby the superintendent is a trained administrator serving at the pleasure of the county board. This plan is no more incompatible with county manager government than with city manager government in municipalities.

<sup>17</sup> See B. F. Wright, *The Merit System in American States*, 51 *et seq.* (University of Texas Bulletin, No. 2305, 1923), and R. W. Belcher, "The Merit System and the County Civil Service," 47 *Annals Am. Acad. of Pol. and Soc. Sci.*, 101-111 (1913).

ness for a particular place may be best determined by the one or the other method. No person should be eligible to employment without certification from the state civil service commission. The power of the manager to dismiss department heads should be unrestricted; all others, after a period of probation, might well be allowed a hearing by a trial board. This plan would enable the state to establish minimum qualifications for county officers and at the same time permit adequate centralization within the organization of the county government itself. Since central administrative control over purely local matters is usually very limited it is unlikely that serious conflicts would arise between state and local officials. If such should occur, however, state authorities necessarily must prevail. The manager should himself be under civil service regulations, the same as the administrative department heads. He should possess certain qualifications as a prerequisite for appointment. Only in this way can the local administrative service thoroughly be professionalized. The manager and the administrative heads should be removable by the state civil service commission for misconduct or dereliction of duty. The county board should have the power to remove the manager with or without stated cause.

### III. REFORM OF THE COUNTY BOARD

The county board might well be elected at large according to the principles of proportional representation and subject to recall. The small board of three to seven members is most desirable. The impression still remains in this country that the representative character of a body is in direct proportion to its size. While this idea doubtless has some foundation in logic, psychology consistently has attested to its error.<sup>18</sup> The immediate reasons for a reduction in the size of the board are more practical, however. The first of these is that its present large size necessitates comparatively infrequent sessions, with a resultant detachment from the actual work of the various administrative offices. Even in the event of the adoption of the manager plan of county government, the desirability and necessity of constant supervision by the board

<sup>18</sup> See J. S. Mill, *Representative Government*, Ch. X. Strictly speaking, since its policy determining powers are so much restricted, there is no very essential reason why a county board should be represented at all. Supervision by a board, however, does insure a balance and sanity in administration conspicuously lacking in assemblages of experts and technicians. It is recognized, of course, that the representative characteristics of the county board are probably of less importance than those of the municipal council.

are not thereby lessened; there is no point to eliminating popular control through elected representatives simply because the subordinate offices can no longer be filled by popular election. Moreover, elevating the dignity of the county board by giving it actual and effective supervisory powers emphasizes the reasons for its reduction in size. Large boards are unwieldy and slow in operation; supervision of administration, however, calls for immediate and decisive action. Dividing the board into committees for supervisory purposes is an admission of its improper size and also makes its general sessions perfunctory in character. In other words, the committee system practically destroys the board and fails to maintain the principle of the separation of functions, inasmuch as it practically necessitates usurpation of the functions of the board by the manager. Finally, the election of boards from districts lends impetus to a pronounced tendency toward log-rolling and other evils which are noted in municipal ward-elected councils. The reduction of the size of the board and its selection at large would undoubtedly strengthen it, give it collegiate responsibility, and incline it to consider the welfare of the county as a whole as its primary objection.<sup>19</sup> The county board should be something "more than an epitomized electorate." It should be in position to discover what is needed and then to embody its best discretion into administrative action. It should have control of administration through the manager as the means for executing its policy. While the selection of subordinate county officials would under this arrangement be taken from the people, popular control would be simplified, fixed, and increased since the board could be held responsible for both policy and administration.<sup>20</sup>

#### THE ELIMINATION OF THE FEE SYSTEM

"The fee system, necessary as it may have been in the pioneer days of statehood, when there was little money available for salaries and when the duties of public office demanded but a small portion of the officials' time, has been so often attacked and is so generally recognized as pernicious that were it not for the or-

<sup>19</sup> See in this connection Porter, *op. cit.*, 293. The fundamental problem is the revitalization of the county board. There can be no particular advantage to be derived from increasing its powers without reducing its present membership to where those powers profitably may be utilized. Certainly a diminution in numbers is an essential part of such a revitalizing program.

<sup>20</sup> Gilbertson, *The County*, 171. See also Richard S. Childs, "Ramshackle County Government," 133 *Outlook*, 39-45 (1916).



ganized opposition of the incumbents who profit by the system, it would long since have been discarded in this state [Texas] as it has been in a number of others.”<sup>21</sup> The placement of all county officials on a salary basis would promote both efficiency and economy, and eliminate one of the major incentives and temptations to corruption.

In many instances the fees amount to a much larger sum than the majority of federal and state officers receive as salaries. In fact, this is the main reason why the fee system is retained. County officials in states where the fee system exists hire expert lobbyists to prevent legislatures from abolishing it.<sup>22</sup> The fees are supposed to bear a fair relation to the service rendered and to increase the efficiency of the officer. As a matter of fact the original object of the system was to provide a very necessary service at as little expense as possible. It was thought that the work of the offices to which the fee system was attached did not justify salaries. The growth of population and business has reversed this situation. Hence, the tendency is away from the fee system as a method of compensating public officers.

### COUNTY POLICE

“Another very striking need of county government is a system of county police. The sheriff and the constables are, it is true, supposed to be the guardians of the peace. But the sheriff has so many other functions to perform that his police activities are limited to organizing the pursuit of criminals frequently many hours after the crime has been committed, and the protective functions of the constables are a joke. What is needed for adequate police protection in the open country is a system of mounted county police who can really patrol the area of the county. In border counties in Texas the Rangers perform a function of this kind which should be desirable for all counties.”<sup>23</sup> These police should be placed under the direct administrative supervision of the sheriff, and paid

<sup>21</sup> James, *County Government in Texas*, 98-99.

<sup>22</sup> See C. L. Jones, “The County in Politics,” 47 *Annals of the Am. Acad. of Pol. and Soc. Sci.*, 85-100 (1913).

<sup>23</sup> James, *County Government in Texas*, 99. These county police would be identical with the present state police as they are organized in many jurisdictions, and since they would be under the control of the state would be exclusively state officers. The important feature for county reorganization, however, is getting the rural areas constantly and efficiently patrolled. The present high degree of “bandit mobility,” due to the use of the automobile, necessitates immediate and decisive action.

and controlled by the state. Since cities profit almost equally with the rural areas in the maintenance of order and the suppression of violence, state taxation of a general character for the support of these county police would not be objectionable. The present-day motor patrol, while performing an invaluable function, does not adequately meet the situation;<sup>24</sup> the preservation of the social order depends probably less upon bringing speeders and reckless motorists to justice than upon a thorough and efficient system of policing the entire rural area.<sup>25</sup>

### SEPARATION OF COUNTY AND CITY FUNCTIONS

Another problem which has thus far not satisfactorily been met is that of determining the proper relation between the county and the incorporated communities which lie within its geographical limits.<sup>26</sup> These municipalities are constituted for the performance of approximately the same functions which have been entrusted to the county as a whole, and yet the relative jurisdiction of the two areas with regard to these activities has remained comparatively undefined. "In such matters as the arrest of offenders, preservation of the public health, care of the poor, etc., there is a concurrent jurisdiction which may become a source of conflict,<sup>27</sup> or, what is more likely, the source of gaps in governmental activity which are not filled because each unit leaves it to the other."<sup>28</sup>

In this connection should be noted also the duplication of functions which almost invariably appears in counties containing cities of comparatively large populations. It not infrequently happens that the city contains more than half of the population of the county and pays a still greater percentage of the taxes. This means that the city pays exclusively for its own activities and for the major part of those of the rural part of the county. Law enforcement, health, education, roads, and charity are a few of the sub-

<sup>24</sup> In several states, such as Delaware, Maryland, and Washington, the state police are merely highway officers. Illinois, in 1925, extended general police powers to its state highway maintenance patrol. See A. N. Holcombe, *State Government in the United States* (Rev. Ed., 1926), 365-369.

<sup>25</sup> See Porter, *op. cit.*, 175.

<sup>26</sup> See T. H. Reed, "Municipal Development in the United States and Canada," 21 *Am. Pol. Sci. Rev.*, 360 (1927); C. C. Maxey, "Political Integration of Metropolitan Communities," 11 *Nat'l. Mun. Rev.*, 299 (1922); also *Illinois Constitutional Convention Bulletin*, No. 11, 975 (1920).

<sup>27</sup> Witness the comparatively recent occurrences at Herrin, in Williamson County, Illinois, in which local officers, city and county, came frequently into armed conflict.

<sup>28</sup> James, *County Government in Texas*, 100.

jects in the administration of which this overlapping is found. There also results from this situation unnecessary duplication of machinery. The remedy for this situation is to make every city of 50,000 or more inhabitants a county under the administration of its own officers. This suggestion is based on the regular practice in England and France. This plan is being adopted in an increasing number of instances in the United States. Every county then, whether urban or rural, would assume its own responsibility and pay its own bills. This arrangement would eliminate duplication in functions and machinery as well as relieve the city taxpayers of an unfair burden which the present situation imposes upon them and which causes city property to be taxed at much higher valuations than is the case with rural property. If rural counties needed more revenues under this plan, it could be supplied by increased valuation or from the state treasury.<sup>29</sup>

#### ELIMINATION OF MINOR ADMINISTRATIVE UNITS

A further specific objection to the prevailing system of county governmental organization is the multiplicity of special subordinate divisions created by legislative enactment.<sup>30</sup> This welter of drainage districts, improvement districts, irrigation districts, park districts, road districts, and utility districts should be abolished. Many of these subdivisions have their own special officers, and have an independent borrowing and taxing power, thus needlessly multiplying an already overabundance of governmental areas and taxing corporations. One of the major reasons for the failure of county government is its lack of important functions. The county has been too much of a legal fiction with its legitimate functions performed by either the state, or the city or another unit. Incorporated cities, towns, and villages are, of course, excepted from its jurisdiction. The city does not create special subdivisions for the improvement of streets or the provision of certain sections with sewerage. Such improvements are made by means of a benefit assessment. There is no valid reason why a county could not use

<sup>29</sup> See F. W. Coker, "Administration of Local Taxation in Ohio," 47 *Annals of the Am. Acad. of Pol. and Soc. Sci.*, 182-198 (1913).

<sup>30</sup> See G. P. Gruenberg, "Incorporated Districts—Blessings or Drawbacks," 28 *American City*, 593 (1923). The problem of internal, independent taxing jurisdiction has served needlessly to complicate questions of county finance and control. Without question a simpler and more satisfactory method would be the construction of such rural projects according to a scientific scheme of special assessment.

the same method with equal advantage. The administration of strictly county functions should be unified.<sup>31</sup>

### REDEFINITION OF COUNTY FUNCTIONS

The primary step in the process of internal reorganization is a redefinition of functions.<sup>32</sup> Under the county manager plan the chief function of the board would be to employ a manager from among the list certified by the state civil service commission. The board also would pass ordinances for the regulation of county activities; determine the tax rate for county purposes; approve or modify the budget proposal prepared and submitted by the manager; make appropriations in pursuance of the budget; grant to the manager the power of making certain contracts; and generally supervise the administration of the county government. Inasmuch as the actual administrative tasks of the county board would be reduced to a minimum, its members might well serve without pay, or with such slight remuneration as to prevent membership on the board from being attractive to the petty politician. Such a system would enable successful business and professional men to participate in county administration as they now do in municipal administration under the city manager plan. The manager would himself necessarily be a well-paid official, devoting full time to the work. "He would have direct control over all the business and administrative work of the county, recognizing responsibility only to the board and to the state."<sup>33</sup> He would appoint all the subordinates necessary to the administration of county affairs, such as departmental chiefs, upon proper certification from the state civil service commission; these department heads would, in turn, select their administrative subordinates, clerical officials, and manual laborers under like restrictions. Over the whole administrative organization the manager would exercise constant supervision and authoritative control. In addition he would negotiate contracts for the county

<sup>31</sup> Gilbertson, *The County*, 168-180.

<sup>32</sup> Porter, *op. cit.*, 293 *et seq.* This redefinition of functions should be not too inelastic. Its purpose is to secure an approximately logical grouping and coordination of administrative officers. Even optional charter plans cannot provide for the minute developments in particular counties; consequently sufficient elasticity should be allowed to permit the absorption of these new functions without radical structural rearrangements.

<sup>33</sup> *Ibid.*, 300. As in the case of the city manager plan, the county manager profession probably would be recruited from among those skilled in a particular phase of public service, such as engineering or finance. Cities have quite universally found this plan economical, as well as generally satisfactory.



upon authorization of the board, prepare and submit, as well as execute, the annual budget, and lay all claims against the county before the board for its consideration and approval before payment. This redefinition of functions would extend to administrative heads and intra-departmental officials and employees; and would, in considerable degree, necessitate a thoroughgoing reallocation of county functions. Such extraneous duties as that of giving legal advice to the county officials would be removed from the public prosecutor since he should be appointed by state authorities. In addition, it is suggested that the functions of keeping vital statistics or compiling the school census is hardly an appropriate function of the county tax collector or auditor. It would, therefore, be necessary to create the office of county attorney, the functions of which official should be simply those of counsel for the county in such matters as the drafting of contracts to which the county is a party, and the handling of litigation in which the county is involved. Reorganization ought logically to include making court clerks and county clerks entirely separate officers, the latter being included in the organization of the county department of records and the former appointed by the state government and attached to the court. In brief, extraneous functions should be taken from officials having well-defined duties and vested in the state officers if they relate to state activities, or in appropriate county officials if they are clearly local functions.<sup>34</sup>

#### DEPARTMENTAL ORGANIZATION

Structural arrangements would vary with the particular type of optional charter adopted or home rule charter accepted. It has been suggested that six departments might well be organized under the county manager plan. In view of the separation of state and local functions and the exclusion of those officers whose duties pertain almost entirely to the state from the county organization proper, it is believed that this arrangement, with slight changes, would adequately provide for all activities appropriately within the province of county government. Departments properly should be organized on a line-staff basis, the department of finance and records keeping all county records, such as are at present kept by the county clerk and recorder, and certain of those kept by departments individually.<sup>35</sup> Since the assessment and collection of taxes

<sup>34</sup> *Ibid.*, 289.

<sup>35</sup> The line-staff principle can be carried too far. There are certain recording functions which, for convenience and efficiency, the several departments

are not legitimate local functions, the officers performing these functions would be eliminated from county government by this plan of reorganization. A careful study in each instance should be made, however, in order that the optional plans provided should bear an intimate and workable relation to the various types of problems presented by the different areas of local government and administration.

As previously indicated the department of law should be headed by an attorney appointed by the manager, and, as suggested, having only advisory and civil functions.<sup>36</sup> The department of engineering should include all engineering activities previously performed by the county not relinquished to the state; in addition, it should include within its jurisdiction the improvement work which is at present conducted by the independent improvement districts within the county. In this manner it would become a vital part of the county organization rather than the obscure office which it is at present.<sup>37</sup> The department of poor relief, properly a county function, should include also those activities not relinquished to the state such as the care of mental defectives, deaf, dumb, and blind; in addition, it should take over the poor relief work which is performed in an extremely desultory fashion at the present time by municipalities. The department of health and sanitation should include probably the present functions of the coroner, in conjunction with the department of law, in addition to those functions which it at present performs. The coroner's office, as such, ought logically to have been abolished many years ago. This department should be directed by an able physician. Departments of education are, at present, fairly well organized in most respects except with reference to the election of the county superintendent, who ought to be a technically trained educational administrator. He should be selected by the county board of education or the county manager. Popular election has never yet satisfactorily filled offices calling for technical qualifications. Either of the plans suggested would remedy this defect and place the county school system upon the non-political basis which its importance merits and demands.<sup>38</sup>

will be forced to perform. The general idea of line-staff departmental organization should be followed as far as practicable, however.

<sup>36</sup> The functions of such an attorney conceivably might extend to the defense of county officers in suits against them; this occurs quite frequently in municipalities.

<sup>37</sup> See James, *County Government in Texas*, 100 et seq.

<sup>38</sup> Recognizing the county as the fundamental unit of elementary educational administration, there has been appreciable agitation favoring centralization in this direction. The appointive county superintendent, and the

*THE EXTENSION OF STATE AID*

It is quite obvious that if these functions are to be performed efficiently a general extension of state aid will be necessary. This problem is more a matter of efficiency in administration than of the redistribution of the tax burden. Internal reorganization is but a preliminary step in the direction of administrative efficiency. As President Goodnow has indicated, the corporate functions of the county are exercised for the benefit of the people at large rather than those of a particular community.<sup>39</sup> There is consequently no injustice in taxing the state at large for the conduct of county government except for those improvements which are purely local. And the authorities are substantially agreed that these functions can be most equitably financed by state taxation and state redistribution rather than by the several localities.

*REMEDY FOR PROCEDURAL INEFFICIENCY*

More important, however, are considerations of procedural efficiency. If county governments are to make appreciable advances in the administration of governmental affairs they must use modern methods of procedure. That inefficiency and needlessly uneconomical methods prevail quite generally in the transaction of the business of counties is a matter of common knowledge.<sup>40</sup> That the control of county government is the chief object of the spoilsman is a matter of historical record. Boss Tweed robbed the city and borough governments of the metropolitan New York area of more than \$45,000,000, and by the end of 1869 was averaging a million dollars a month. Bosses of less spectacular, as well as less dangerous, careers have done proportionately quite as well. But the percentage of public funds dissipated through dishonesty and theft is but a bagatelle in comparison to that which has been wasted by inefficient business methods and antiquated equipment. County budgetary systems of a thoroughgoing type are indeed rarities in the field of local administration. Illegal expenditures, made either maliciously or through ignorance, are common enough.

lessening of the autonomy of purely local functionaries is an integral part of this program.

<sup>39</sup> F. J. Goodnow, *Comparative Administrative Law* (Students Ed., 1903), 177.

<sup>40</sup> See H. A. Barth, "County Government in the Southwest," 14 *Nat'l. Mun. Rev.*, 140 (1925); also Alfred E. Smith, "New York County Government Archaic," 15 *Nat'l. Mun. Rev.*, 399 (1926).

The accounting systems and methods of recording are unrecognizable as such in most instances, although some reforms have been accomplished in this connection. Massachusetts, New York, Ohio, Iowa, and Minnesota authorize appropriate state administrative departments to supervise, inspect, and periodically to audit county financial transactions. New York, Iowa, and Nebraska require uniform accounting systems at the present time. North Carolina and California prescribe uniform budgetary systems for their counties; a number of states require periodic reports of one sort or another from local officials. These latter requirements afford no suitable basis whatever for adequate regulation, insuring only the enforcement of the barest constitutional limitations. The tendency toward administrative control is pronounced, but is as yet inadequate to secure efficiency and accuracy in county activities. State inspection and regulation should logically be extended to county finance departments even in the event of the removal of assessment and collection of taxes from the immediate jurisdiction of the county. The county is a governmental and public corporation; it is of the utmost importance that its affairs receive the periodic inspection and approval of the state, precisely as many corporations which are non-governmental and of a less public character.

#### NECESSITY FOR RESEARCH

The most important prerequisite to action in any particular instance, however, is research of a most careful and thoroughgoing sort. Studies such as Maxey's of Delaware,<sup>41</sup> James's of Texas, Wager's of North Carolina,<sup>42</sup> and the Governor's Committee of the same state,<sup>43</sup> and the Virginia Survey of the National Institute of Public Administration and others are necessary to provide the proper material for a program of county reconstruction. It is interesting and gratifying to note that bureaus of governmental research throughout the United States are turning their attention whole-heartedly to the problems of the dark continent of American politics—to the reorganization and reconstruction of county government. Above all, it must be remembered that county reform cannot proceed upon the assumption that the county is an isolated unit. It must be discovered in its relationships to the state, cities, and other local governmental units. No small part of the task

<sup>41</sup> C. C. Maxey, *County Administration* (1919), *passim*.

<sup>42</sup> P. W. Wager, *County Government in North Carolina* (1928), *passim*.

<sup>43</sup> Summarized in 15 *Nat'l. Mun. Rev.*, 730 (1926).



of reform in states where counties and townships exist side by side will be to eliminate the incongruities between these two systems. It is entirely probable that a comprehensive program of county reform may necessitate certain alterations in state and municipal government; time will serve but further to complicate an already almost hopeless tangle.

It is possible for reform of a superficial character to be brought about without constitutional amendment in many of the states. Where constitutions have left the problem to legislative determination, the task is comparatively simple. In the vast majority of states, however, county governmental structure is prescribed in the constitution; in such states nothing less than a radical and totally inclusive reformation of those portions of the fundamental law relating to county government will clear the way for that unification and simplification of governmental structure which is an indispensable antecedent to local administration of an efficient and truly democratic character. We have temporized too long already with makeshift reforms in the field of local government. If the history of municipalities in the United States is of any significance whatever, it indicates that governmental organization developing in a haphazard fashion and perpetuated in the "legal granite of state constitutions," can successfully be reformed and adapted to the new order only by constitutional changes.

## APPENDIX



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# CONSTITUTION OF THE UNITED STATES

We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this CONSTITUTION for the United States of America.

## ARTICLE I

SECTION I. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.

SECT. II. 1. The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislature.

2. No person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

3. Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

4. When vacancies happen in the representation from any State, the Executive authority thereof shall issue writs of election to fill such vacancies.



5. The House of Representatives shall choose their Speaker and other officers; and shall have the sole power of impeachment.

SECT. III. 1. The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof, for six years; and each Senator shall have one vote.

2. Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one third may be chosen every second year; and if vacancies happen by resignation or otherwise, during the recess of the legislature of any State, the Executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

3. No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

4. The Vice-President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.

5. The Senate shall choose their other officers, and also a President *pro tempore*, in the absence of the Vice-President, or when he shall exercise the office of President of the United States.

6. The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside: and no person shall be convicted without the concurrence of two thirds of the members present.

7. Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States: but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.

SECT. IV. 1. The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

2. The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

SECT V. 1. Each house shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of

absent members, in such manner, and under such penalties, as each house may provide.

2. Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and with the concurrence of two thirds, expel a member.

3. Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either house on any question shall, at the desire of one fifth of those present, be entered on the journal.

4. Neither house, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

SECT. VI. 1. The Senators and Representatives shall receive a compensation for their services, to be ascertained by law and paid out of the treasury of the United States. They shall in all cases except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place.

2. No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased, during such time; and no person holding any office under the United States shall be a member of either house during his continuance in office.

SECT. VII. 1. All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.

2. Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it with his objections to that house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and, if approved by two thirds of that house, it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

3. Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

SECT. VIII. The Congress shall have power

1. To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

2. To borrow money on the credit of the United States;

3. To regulate commerce with foreign nations, and among the several States, and with the Indian tribes;

4. To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

5. To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

6. To provide for the punishment of counterfeiting the securities and current coin of the United States;

7. To establish post offices and post roads;

8. To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

9. To constitute tribunals inferior to the Supreme Court;

10. To define and punish piracies and felonies committed on the high seas and offences against the law of nations;

11. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

12. To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

13. To provide and maintain a navy;

14. To make rules for the government and regulation of the land and naval forces;

15. To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;

16. To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

17. To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of government of the United States, and to exercise like authority over all

places purchased by the consent of the legislature of the State, in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings;—and

18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or office thereof.

SECT. IX. 1. The migration or importation of such persons as any of the States now existing shall think proper to admit shall not be prohibited by the Congress prior to the year 1808; but a tax or duty may be imposed on such importation, not exceeding \$10 for each person.

2. The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

3. No bill of attainder or *ex post facto* law shall be passed.

4. No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken.

5. No tax or duty shall be laid on articles exported from any State.

6. No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another: nor shall vessels bound to, or from, one State, be obliged to enter, clear, or pay duties in another.

7. No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

8. No title of nobility shall be granted by the United States: and no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.

SECT. X. 1. No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility.

2. No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

3. No State shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.



## ARTICLE II

SECTION I. 1. The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and together with the Vice-President, chosen for the same term, be elected as follows :

2. Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress ; but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

[The electors shall meet in their respective States, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each ; which list they shall sign and certify, and transmit sealed to the seat of government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed ; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President ; and if no person have a majority, then from the five highest on the list the said house shall in like manner choose the President. But in choosing the President the votes shall be taken by States, the representation from each State having one vote ; a quorum for this purpose shall consist of a member or members from two thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice-President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice-President.]

3. The Congress may determine the time of choosing the electors, and the day on which they shall give their votes ; which day shall be the same throughout the United States.

4. No person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the office of President ; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

5. In case of the removal of the President from office or of his death, resignation, or inability to discharge the powers and duties of

the said office, the same shall devolve on the Vice-President, and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice-President, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected.

6. The President shall, at stated times, receive for his services, a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

7. Before he enter on the execution of his office, he shall take the following oath or affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States."

SECT. II. 1. The President shall be commander in chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.

2. He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

3. The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

SECT. III. He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

SECT. IV. The President, Vice-President and all civil officers of the United States, shall be removed from office on impeachment for, and on conviction of, treason, bribery, or other high crimes and misdemeanors.

### ARTICLE III

SECTION I. 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

SECT. II. 1. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more States;—between a State and citizens of another State;—between citizens of different States;—between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign states, citizens or subjects.

2. In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

3. The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

SECT. III. 1. Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

2. The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.

### ARTICLE IV

SECTION I. Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State.

And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

SECT. II. 1. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

2. A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

3. No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

SECT. III. 1. New States may be admitted by the Congress into this Union; but no new States shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the legislatures of the States concerned as well as of the Congress.

2. The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.

SECT. IV. The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.

## ARTICLE V

The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several States, shall call a convention for proposing amendments, which, in either case shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several States, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendments which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.



## ARTICLE VI

1. All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

2. This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

3. The Senators and Representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

## ARTICLE VII

The ratification of the conventions of nine States, shall be sufficient for the establishment of this Constitution between the States so ratifying the same.

Done in Convention by the unanimous consent of the States present, the seventeenth day of September in the year of our Lord one thousand seven hundred and eighty-seven and of the Independence of the United States of America the twelfth. In witness whereof we have hereunto subscribed our names.

[Signed by]

G<sup>o</sup> WASHINGTON

*Presidt and Deputy from Virginia*

ARTICLES IN ADDITION TO AND AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES, PROPOSED BY CONGRESS, AND RATIFIED BY THE LEGISLATURES OF THE SEVERAL STATES, PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION <sup>1</sup>

ARTICLE I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

ARTICLE II. A well-regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

<sup>1</sup> The first ten Amendments were adopted in 1791.

ARTICLE III. No soldier shall, in time of peace be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

ARTICLE IV. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

ARTICLE VI. In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

ARTICLE VII. In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

ARTICLE VIII. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE IX. The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

ARTICLE X. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

ARTICLE XI. The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign state. [Adopted in 1798.]

ARTICLE XII. The electors shall meet in their respective States, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they

shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of government of the United States, directed to the President of the Senate;—the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—the person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States. [Adopted in 1804.]

ARTICLE XIII. Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation. [Adopted in 1865.]

ARTICLE XIV. Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of Electors for President and Vice-President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or Elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two thirds of each house, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be illegal and void.

Section 5. The Congress shall have power to enforce by appropriate legislation the provisions of this article. [Adopted in 1867.]

ARTICLE XV. Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation. [Adopted in 1870.]

ARTICLE XVI. The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration. [Adopted in 1913.]

ARTICLE XVII. Section 1. The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite



for electors of the most numerous branch of the State Legislatures.

Section 2. When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided that the Legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the Legislature may direct.

Section 3. This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution. [Adopted in 1913.]

ARTICLE XVIII. Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from, the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided by the Constitution, within seven years from the date of the submission hereof to the States by the Congress. [Adopted in 1919.]

ARTICLE XIX. Section I. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Section 2. The Congress shall have power to enforce this article by appropriate legislation. [Adopted in 1920.]

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